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TABLE OF CASES

(26,964)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1921

No. 13

WILLIAM TRUAX AND WILLIAM A. TRUAX, CO-PARTNERS, DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF WILLIAM TRUAX, Plaintiffs in Error,

vs.

MICHAEL CORRIGAN, ALBERT SHIPP, CHARLES BROOKS, ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ARIZONA

SUPPLEMENTAL BRIEF FOR PLAINTIFFS IN ERROR

At the former hearing of this cause it was contended by counsel for defendants (1) that the acts and conduct of defendants, as described and set forth in the complaint, did not constitute a "boycott" in any proper sense of that word; (2) that even in the absence of the statute here in question (Rev. Stat. Ariz., 1913, Civ. Code, Par. 1464), the acts complained of could not have been enjoined, and that plaintiffs were, therefore, not deprived by the statute of any remedy which they would otherwise have had; and (3) that even though, in the absence of the statute, plaintiffs might have been able to procure

such an injunction, still the statute, although depriving them of that remedy, did not thereby deny to them the equal protection of the laws guaranteed by the Fourteenth Amendment. The purpose of this supplemental brief is to disprove these contentions by establishing affirmatively the following propositions:

(1) The acts and conduct of defendants, as described and set forth in the complaint, constitute what is known to the law as a secondary boycott.

(2) But for the statute in question (Rev. Stat. Ariz., 1913, Civ. Code, Par. 1464), the secondary boycott described in the complaint could have been enjoined.

(3) In depriving plaintiffs of the right, which they would otherwise have had, to enjoin the secondary boycott described in the complaint, while leaving the remedy by injunction still available to other litigants, the statute in question denies to plaintiffs the equal protection of the laws, contrary to the Fourteenth Amendment to the Constitution of the United States.

I

The acts and conduct of defendants, as described and set forth in the complaint, constitute what is known to the law as a secondary boycott.

In the first four paragraphs of the complaint (Transcript, pp. 1, 2) it is alleged, in substance, that the individual defendants were employed by plaintiffs in their restaurant known as the English Kitchen; that a dispute arose between plaintiffs and the defendant union, of which the individual defendants were members, concerning the terms and conditions of their employment, in the course of which dispute the defendant union made certain demands on plaintiffs, with which demands plaintiffs refused to comply; that because of such refusal, the defendant union ordered a strike of all its members em-

ployed by plaintiffs; and that, in obedience to this order, the individual defendants left their employment and went out on strike. Paragraph V of the complaint reads as follows:

> "For the purpose of winning said strike, and for the purpose of coercing and compelling plaintiffs to comply with said demands and to settle said dispute in a manner approved by defendant Bisbee Local No. 380 Cooks' and Waiters' Union, defendants and numerous other persons unknown to plaintiffs, but fully known to and acting in concert with defendants, on or about the 10th day of April,1916, conspired and combined to inaugurate, and did inaugurate a boycott of plaintiffs and their said restaurant and restaurant business, and conspired and combined to induce plaintiffs' customers and patrons and other persons theretofore well and favorably disposed towards plaintiffs to cease and refrain from patronizing or trading with plaintiffs in their said restaurant."

Paragraphs VI, VII and VIII of the complaint specify certain acts which have been and are being committed by defendants, and it is alleged in each of those paragraphs that the acts so specified have been and are being done "for the purposes aforesaid, and in furtherance of said boycott and of said conspiracy and combination." Thus it will be seen that the complaint not only alleges the existence of a boycott, but sets forth also the purposes for which, and the means by which, it is being carried on. The means and purposes thus alleged in the complaint disclose the true character of the boycott, and place it definitely within that class of boycotts which in recent years have come to be known as "secondary boycotts."

In the case of *Duplex Printing Press Co. v. Deering*, 254 U. S. 443, 41 S. Ct. 172, this Court defines the term "secondary boycott" as "a combination not merely to refrain from dealing with complainant, or to advise or by

peaceful means persuade complainant's customers to refrain ('primary boycott'), but to exercise coercive pressure upon such customers, actual or prospective, in order to cause them to withhold or withdraw patronage from complainant through fear of loss or damage to themselves should they deal with it."

This definition of the phrase "secondary boycott" is, in substance, the same as that which other courts have generally given to the single word "boycott."

Casey v. Cincinnati Typographical Union, 45 Fed. 135;

Toledo, Ann Arbor & North Mich. Ry. Co. v. Pennsylvania Co., 54 Fed. 730;

Hopkins v. Oxley Stave Co., 83 Fed. 912, 28 C. C. A. 99;

Union Pac. Ry. Co. v. Ruef, 120 Fed. 102;

Rocky Mountain Bell Tel. Co. v. Montana Federation of Labor, 156 Fed. 809;

Meier v. Speer, 96 Ark. 618, 132 S. W. 988;

State v. Glidden, 55 Conn. 46, 8 Atl. 890;

Funck v. Farmers' Elevator Co., 142 Iowa 621, 121 N. W. 53;

My Maryland Lodge No. 186 v. Adt, 100 Md. 238, 59 Atl. 721;

Klingel's Pharmacy v. Sharp & Dohme, 104 Md. 218, 64 Atl. 1029;

Beck v. Railway Teamsters' Protective Union, 118 Mich. 497, 77 N. W. 13;

Baldwin v. Escanaba Liquor Dealers' Assn., 165 Mich. 98, 130 N. W. 214;

Gray v. Building Trades Council, 91 Minn. 171, 97 N. W. 663;

Lohse Patent Door Co. v. Fuelle, 215 Mo. 421, 114 S. W. 997;

Clarkson v. Laiblan, 178 Mo. App. 708, 161 S. W. 660;

Branson v. Industrial Workers of the World, 30 Nev. 270, 95 Pac. 354;

Barr v. Essex Trades Council, 53 N. J. Eq. 101, 30 Atl. 881;

Matthews v. Shankland, 56 N. Y. Supp. 123, 25 Misc. 604;

State v. Van Pelt, 136 N. C. 633, 49 S. E. 177;

Hall v. Johnson, 87 Ore. 21, 169 Pac. 515;

Brace Bros. v. Evans, 5 Pa. Co. Ct. 163, 3 Ry. & Corp. Law J. 561;

Crump v. Commonwealth, 84 Va. 927, 6 S. E. 620.

The term "boycott," wherever it occurs in the complaint or in the brief heretofore filed by plaintiffs, is used in the same sense and is intended to convey the same meaning as that which this Court, in the *Duplex Printing Press* case, attributes to the term "secondary boycott". In other words, plaintiffs, following the example set by the courts whose decisions we have just cited, have heretofore applied the name "boycott" to the thing which this Court, with greater accuracy and discrimination, calls a "secondary boycott".

At the former hearing of this cause, it was contended by counsel for defendants that the acts here complained of amounted to no more than peaceful persuasion, and that the element of "coercive pressure" necessary to con-

stitute what this Court terms a "secondary boycott", and what most other courts speak of simply as a "boycott," was lacking. An examination of the record will show that this contention is not well founded. The record shows (Transcript, pp. 3, 4) three kinds or classes of acts by means of which the boycott here in question was made effective, namely, (1) the picketing of plaintiffs' place of business; (2) the public denunciation of plaintiffs and their place of business as being "unfair"; and (3) the circulation and distribution of printed handbills of a scurrilous, abusive and threatening character among plaintiffs' customers, actual and prospective. In each of these activities there was, as we shall presently show, an element of intimidation and coercion.

As to the picketing of plaintiffs' place of business, the complaint alleges (Transcript, p. 3) that for the purpose of winning their strike, and for the purpose of coercing and compelling plaintiffs to comply with their demands, and in furtherance of their boycott and of their conspiracy and combination to induce plaintiffs' customers and patrons to cease and refrain from patronizing or trading with plaintiffs, defendants have caused and are causing certain persons to walk back and forth on the street immediately in front of plaintiffs' restaurant, and within about five feet of the entrance thereto, during such hours of each day as said restaurant is open for business, and, while so walking, to carry and display, in a conspicuous manner, certain banners bearing on each side thereof certain notices advertising and calling attention to the dispute between plaintiffs and defendants, and referring to plaintiffs' restaurant as being "unfair". In other words the complaint alleges a typical case of picketing.

This very fact of picketing is in itself sufficient to

show the coercive character of the means employed by defendants in carrying on their boycott. The late Judge McPherson spoke the truth and nothing but the truth when he said, in the case of *Atchison, T. & S. F. Ry. Co. v. Gee*, 139 Fed. 582:

> "There is and can be no such thing as peaceful picketing, any more than there can be chaste vulgarity, or peaceful mobbing, or lawful lynching. When men want to converse or persuade, they do not organize a picket line. When they only want to see who are at work, they go and see, and then leave, and disturb no one physically or mentally. But such picketing as is displayed in the case at bar by the evidence does, and is intended to, annoy and intimidate."

More recently, in the case of *Vonnegut Machinery Co. v. Toledo Machine & Tool Co.*, 263 Fed. 192, another federal judge has observed:

> "In ordinary conduct men use the vocabulary of their class, and, when their interests are actively aroused and their passions stimulated, the bonds of their own conventions are soon snapped, and their verbal weapons begin to lose refinement. We would expect a picket line of college metaphysicians, or of theologians, who were really spiritually sweet and supernaturally self-controlled, to maintain, under extreme aggravation, a course of action which might be calmly persuasive and well within the theory of the law; but men of more vigorous pursuits, especially if their vocations, as well as their avocations, bring them into more robust and more worldly contacts, tend much more quickly, when milder measures seem to effect little of their aims, to what is known in radical parlance as 'direct action,' and when that element comes into the picket line, even in vocal form, peaceful persuasion takes its flight. It is because the passions of an acute labor controversy tend to mount beyond control, releasing conventional restraints upon social intercourse, that

practical people question the possibility of peaceful persuasion through the practice of picketing."

In the case of *Local Union No. 313 v. Stathakis*, 135 Ark. 86, 205 S. W. 450, which, in its facts, was very similar to the case at bar, the court said:

> "The conduct of the pickets was manifestly not intended merely to give notice to the public that appellee's cafes were unfair to union labor. The area in which the pickets confined their operation is evidence that such alone was not their intention, as their beat was limited to the frontage of appellee's cafes on the streets. Not many, if any, patrons could enter without being observed, and these would know that they had been observed. The number of pickets was increased at the meal hours, when a larger number of people were likely to enter the cafes for their meals. And can there be any real question as to the meaning of the presence of the pickets? Were they not doing something more than giving notice to the public that they had an undecided issue with the business which they were picketing? Were they not saying, even though it was silently said, 'See what we are doing to this man because he has incurred our displeasure? Beware a similar fate!' And was it not necessarily true that many people who had no knowledge or opinion in regard to the existing controversy, and who felt no interest in the terms of its final settlement, were deterred from according the patronage which might otherwise have been given appellee simply because there was a controversy in which they did not desire to even appear to be parties?"

In the case of *Pierce v. Stablemen's Union*, 156 Cal. 70, 103 Pac. 324, the court said:

> "The inconvenience which the public may suffer by reason of a boycott lawfully conducted is in no sense a legal injury. But the public's rights are invaded the moment the means employed are such as are calculated to, and naturally do, incite to crowds,

riots, and disturbances of the peace. A picket, in its very nature, tends to accomplish, and is designed to accomplish, these very things. It tends to, and is designed by physical intimidation to, deter other men from seeking employment in the places vacated by the strikers. It tends, and is designed, to drive business away from the boycotted place, not by the legitimate methods of persuasion, but by the illegitimate means of physical intimidation and fear. Crowds naturally collect; disturbances of the peace are always imminent and of frequent occurrence. Many peaceful citizens, men and women, are always deterred by physical trepidation from entering places of business so under a boycott patrol. It is idle to split hairs upon so plain a proposition, and to say that the picket may consist of nothing more than a single individual, peacefully endeavoring by persuasion to prevent customers from entering the boycotted place. The plain facts are always at variance with such refinements of reason. Says Chief Justice Shaw, in *Commonwealth v. Hunt*, 4 Metc. (Mass.) 111, 38 Am. Dec. 346: 'The law is not to be hoodwinked by colorable pretenses; it looks at truth and reality through whatever disguise it may assume.' If it be said that neither threats nor intimidations are used, no man can fail to see that there may be threats, and there may be intimidations, and there may be molesting, and there may be obstructing, without there being any express words used by which a man could show violent threats towards another, or any express intimidation. We think it plain that the very end to be attained by picketing, however artful may be the means to accomplish that end, is the injury of the boycotted business through physical molestation and physical fear, caused to the employer, to those whom he may have employed, or who may seek employment from him, and to the general public. The boycott having employed these means for this unquestioned purpose is illegal, and a court will not seek by overniceties and refinements, to legalize the use of this unquestionably illegal instrument."

In the case of *Rosenberg v. Retail Clerks' Assn.*, 39 Cal. App. 67, 177 Pac. 864, the court said in reference to the means employed by strikers engaged in a boycott:

> "The question whether picketing is a peaceful and lawful means is one that has also received frequent judicial consideration. The cases in different jurisdictions are not harmonious upon the question. Some of the courts have recognized, or at least do not deny, that picketing may not be unlawful. The weight of authority, however, and the growing tendency, is to accept the contrary view, and to regard picketing as inherently illegal, for the reason that it is inseparably associated with acts that are indisputably illegal. Accordingly, it has been held that there is no such thing as peaceful picketing any more than there can be peaceful mobbing."

In the case of *A. R. Barnes & Co. v. Chicago Typographical Union*, 232 Ill. 424, 83 N. E. 940, the court said:

> "The very fact of establishing a picket line is evidence of an intention to annoy, embarrass, and intimidate, whether physical violence is resorted to or not. There have been a few cases where it was held that picketing by a labor union of a place of business is not necessarily unlawful if the pickets are peaceful and well behaved; but, if the watching and besetting of the workmen is carried to such a length as to constitute an annoyance to them or their employer, it becomes unlawful. But manifestly that is not a safe rule, and furnishes no fixed or certain standard of what is lawful or unlawful. Any picket line must result in annoyance both to the employer and the workmen, no matter what is said or done, and to say that the court is to determine by the degree of annoyance whether it shall be stopped or not would furnish no guide, but leave the question to the individual notions or bias of the particular judge. To picket the complainants' premises

was in itself an act of intimidation and an unwarrantable interference with their rights."

In the case of *Sherry v. Perkins*, 147 Mass. 212, 17 N. E. 307, the defendants, members of the Lasters' Protective Union, were picketing plaintiff's shoe factory, and were carrying and exhibiting in front of the factory a banner bearing the inscription, "Lasters are requested to keep away from P. P. Sherry's. Per order L. P. U.", and also a banner bearing the inscription, "Lasters on a strike; all lasters are requested to keep away from P. P. Sherry's until the present trouble is settled. Per order L. P. U." The court said:

> "The scheme, in pursuance of which the banners were displayed and maintained, was to injure the plaintiff's business not by defaming it to the public, but by intimidating workmen so as to deter them from keeping or making engagements with the plaintiff. The banner was a standing menace to all who were or wished to be in the employment of the plaintiff, to deter them from entering the plaintiff's premises. Maintaining it was a continuous, unlawful act, injurious to the plaintiff's business and property, and was a nuisance, such as a court of equity will grant relief against."

In the case of *Beck v. Railway Teamsters' Protective Union*, 118 Mich. 497, 77 N. W. 13, the court said:

> "The law abhors subterfuges. It lays aside the covering, and looks to the actual facts beneath. In the language of Chief Justice Shaw: 'The law is not to be hoodwinked by colorable pretenses; it looks at truth and reality, through whatever disguise it may assume.' Threats in language are not the only threats recognized by the law. Covert and unspoken threats may be just as effective as spoken threats. * * * To picket complainants' premises in order to intercept their teamsters or persons going there to trade is unlawful. It itself is an act of intimidation, and an unwarrantable interference

with the right of free trade. The highways and public streets must be free to all for the purposes of trade, commerce, and labor. The law protects the buyer, the seller, the merchant, the manufacturer, and the laborer in the right to walk and use the streets unmolested. It is no respecter of persons; and it makes no difference, in effect, whether the picketing is done 10 or 1,000 feet away. It will not do to say that these pickets are thrown out for the purpose of peaceable argument and persuasion. They are intended to intimidate and coerce. As applied to cases of this character, the lexicographers thus define the word 'picket': 'A body of men belonging to a trades union sent to watch and annoy men working in a shop not belonging to the union, or against which a strike is in progress'. Cent. Dict.; Webst. Dict. The word originally had no such meaning. This definition is the result of what has been done under it, and the common application that has been made of it."

In the case of *Webb v. Cooks', Waiters' & Waitresses' Union*, (Tex. Civ. App.), 205 S. W. 465, the defendant union had organized a boycott of plaintiff's business, and was carrying it on by means practically identical with those employed in the case at bar. In the Texas case, as here, it was contended that the picketing was carried on in a peaceful manner, and that there was no coercion or intimidation. The court said:

"We, as a people are exceedingly sensitive to influences of the kind indicated. We have adopted as a slogan the saying, 'Vox populi, vox Dei.' The voice of the people determine the tenure and rewards of the office-holder and who shall hold the offices. The influence of such voice enters into all of our laws, and it is therefore particularly true of us that the office-holder, the candidate for office, those engaged in business, and those of the general public to whom participation in a heated controversy of any kind is distasteful and repugnant, are

all influenced in varying degrees by efforts, vocal or otherwise, of a labor organization with which other labor organizations are affiliated. The evidence shows without dispute that in the city of Ft. Worth there are numerous labor organizations with a large membership which have headquarters in which is designated in the evidence as 'Labor Temple', where the defendant union has its headquarters. It therefore seems idle to say under circumstances as indicated that the acts complained of and shown are not provocative of violence and bloodshed, and do not amount to intimidation and coercion. We at least cannot hide nor obscure the truth with the specious contention urged herein that no open threats or violence was proven. We must know what has frequently been declared in adjudicated cases, that restraint of the mind is just as potent as a threat of physical violence."

In the case of *St. Germain v. Bakery & Confectionery Workers' Union*, 97 Wash. 282, 166 Pac. 665, defendants, in furtherance of a boycott, had stationed pickets on the sidewalk in front of plaintiff's place of business. The court said:

"The only object of maintaining these pickets was to intimidate these appellants and their patrons. There could have been no other object, because the union laborers had been called out. They were not working there, and, in order to require these appellants to employ union labor, the respondents sought to, and did, intimidate the public from entering the stores and dealing with the appellants. Whether these facts were alleged in a complaint which was undenied, or were proven upon a trial, makes no difference. Whether the picketing was peaceable or otherwise, under the facts in this case, is entirely immaterial, because the sole object of the respondents was to intimidate, not only the public, but also these appellants, and to force them to enter into a contract which they were unwilling to enter into. * * * The idea upon which picketing by any

means cannot be sustained is that it intimidates the public from entering into the place, and doing business with a person before whose store or place of business a line of guards is stationed. Where a line of guards, consisting of one or more, is stationed in front of a place of business, every one knows that such guard is there for the purpose of intimidating and preventing the public from dealing with the person whose place of business is picketed. That this is contrary to the spirit of our institutions, and the right to conduct a lawful business in a lawful way, without molestation of other persons, needs no argument to sustain it."

Other cases holding, in effect, that picketing necessarily involves coercion and intimidation are as follows:

American Steel & Wire Co. v. Wire Drawers' & Die Makers' Union, 90 Fed. 608;

Union Pac. Ry. Co. v. Ruef, 120 Fed. 102;

Allis-Chalmers Co. v. Iron Moulders' Union, 150 Fed. 155;

Goldfield Cons. Mines Co. v. Goldfield Miners' Union, 159 Fed. 500;

Goldberg, Bowen & Co. v. Stablemen's Union, 149 Cal. 429, 86 Pac. 806;

Moore v. Cooks', Waiters' & Waitresses' Union, 39 Cal. App. 538, 179 Pac. 417;

Franklin Union No. 4 v. People, 220 Ill. 355, 77 N. E. 176;

Vegelahn v. Guntner, 167 Mass. 92, 44 N. E. 1077;

In re Langell, 178 Mich. 305, 144 N. W. 841;

O'Neil v. Behanna, 182 Pa. St. 236, 37 Atl. 843;

Crump v. Commonwealth, 84 Va. 927, 6 S. E. 620;

Jensen v. Cooks' & Waiters' Union, 39 Wash. 531, 81 Pac. 1069.

Defendants not only picketed plaintiffs place of business, but, in addition thereto, by means of banners and printed hand-bills, and by word of mouth (Transcript, pp. 3, 4), publicly denounced plaintiffs and their place of business as being "unfair". The word "unfair," when used under the circumstances set forth in the complaint in this case, has a special significance that is well understood. It is, in effect, a notification to the public that the place or person declared "unfair" is being boycotted by organized labor, and that anyone who disregards the warning and continues dealing with the boycotted person will thereby incur the enmity of labor organizations generally, and will be likely to suffer some form of retaliation at their hands.

As was said by this Court in the case of *Gompers v. Buck's Stove & Range Co.*, 221 U. S. 418, 55 L. Ed. 797, 31 S. Ct. 492:

> "In the case of an unlawful conspiracy, the agreement to act in concert when the signal is published gives the words "Unfair,' 'We don't patronize,' or similar expressions, a force not inhering in the words themselves, and therefore exceeding any possible right of speech which a single individual might have. Under such circumstances, they become what have been called 'verbal acts,' and as much subject to injunction as the use of any other force whereby property is unlawfully damaged."

In the case of *Seattle Brewing & Malting Co. v. Hansen*, 144 Fed. 1011, the court said:

> "The mere use of the word 'unfair' has a very distinct meaning in these days; and when a notice like this is put out it is almost in the nature of a command. Of course, it does not say to the laboring people, 'You shall not drink' such beer, but it

says: 'To Organized Labor and Friends: Don't use this beer!' These organizations, in the way they are trained, for they are as well trained as any military force, understand these rules and know what they mean. The very use of that term 'unfair' has a distinct meaning to them, and it is in the nature of a direction to the members of these organizations not to use that beer, and it is also an intimidation to those who are dealing in it."

See also *American Federation of Labor v. Buck's Stove & Range Co.*, 33 App. D. C. 83, 32 L. R. A. (N. S.) 748; and *Wilson v. Hey*, 232 Ill. 389, 83 N. E. 928.

Let us now examine the printed handbills (Transcript, pp. 3, 4, 7-15), which were circulated and distributed among plaintiffs' customers, actual and prospective, by the pickets stationed at the entrance to their restaurant. These handbills are all of a scurrilous and abusive character, and many of them contain threatening language. For instance, the one marked "Exhibit A" (Transcript, p. 7) says to prospective customers as they approach plaintiffs' restaurant:

"All Ye Who Enter Here Leave All Hope Behind."

This language is clearly intended to convey, and does convey, a threat of injury to plaintiffs' customers. The fact that the nature of the threatened injury is not specified is immaterial. The vagueness of the threat only renders it the more effective. The intending customer knows that he is threatened with some sort of loss or damage; whether to his person, his property or his business, or how great or how small the loss or damage, or when or where or how the blow may be expected to fall, he does not know. Hence he takes no chances, but, for fear of the threatened injury, withdraws his patronage.

The handbill marked "Exhibit C" (Transcript, pp. 8, 9) contains the following:

"Bill of Fare
"Tuesday

"Fresh Fish
"Los Angeles Suckers
"Entrees
"Rough Stuff Served by Jim Kinney a Specialty
"Assault and Slugging!
"Indifferent Police
"Cabaret Cute Cowboy Stunts."

This is clearly intended to convey the impression that assaults and "slugging" have taken place, and may be expected to take place, in plaintiffs' restaurant, and that the victims thereof can expect no protection from the police. The evident purpose is to create in the minds of prospective customers the fear of physical violence, and thus to intimidate and frighten them away. It will also be noticed that this same handbill concludes as follows:

> "Arizona State Federation, Warren District Trades Assembly, Cooks and Waiters, Painters, W. F. M., Butchers, Carpenters, Bakers, Barbers, I. A. T. S. E., Federal Plasterers, Boot Blacks and Porters, Teamsters and Chauffeurs Pulling Together."

The purpose of this is to intimidate by reminding prospective customers of the great strength and numbers of those who are engaged in the boycott, and whose displeasure will be incurred by anyone who disregards their admonitions not to patronize plaintiffs.

The handbill marked "Exhibit D" (Transcript, p. 9) contains the following:

> "Don't overlook the fact that Bill Truax's past record relative to Union Labor is not an unblemished tablet of stone, but nevertheless it is quite as enduring and he will find it writ in letters large wherever he tries to do business in this U. S. A."

Here is a warning that one who has incurred the enmity of organized labor will be pursued and punished wherever he may go. He cannot escape by quitting the field, giving up his present business, and removing to some distant part of the country. He will be sought out and subjected to punishment "wherever he tries to do business in this U. S. A."

The handbill marked "Exhibit G" (Transcript, p. 11) contains the following:

> "We are not unaware that when two parties fight it is often the case that both sides lose. We are also aware that handbills and banners in front of a business house on the main street give the town a bad name. But they are Permanent Institutions Until Wm. Truax Agrees to the Eight-Hour Day."

This is a warning to the public generally, and especially to those interested in the welfare and good name of the town, that until plaintiffs are made to yield, the town and its citizens must continue to suffer the annoyance and disgrace of having handbills distributed and banners exhibited on its main street. If the citizens wish to hasten the end of this undesirable condition, they can do so by joining in the boycott, and thus helping either to destroy plaintiffs' business, or to compel them to submit to the demands of the defendant union. This is but another form of "coercive pressure".

The handbill marked "Exhibit H" (Transcript, pp. 11,12) contains the following.

> "A union painter just returning from Los Angeles finds that even the famous scab mart of the Pacific Coast is insulted by the insinuation that they are so poor in principle as to be furnishing Scabs for the English Kitchen. Local 17 Cooks and Waiters of Los Angeles Offer A Reward For Proof That Any of Their Members or Any of Their Ex-Members Have Been Even Caught Eating in the English Kitchen, Let Alone Working in the Place."

What is the purpose of advertising that a "reward" has been offered for proof that any member of a certain labor union has been "caught" eating in plaintiffs' restaurant? Is it not to inform the members of that and all other unions that they will be subjected to discipline and punishment if they patronize plaintiffs? Can the purpose be other than to coerce and intimidate?

The handbill marked "Exhibit N" (Transcript, pp. 14, 15) contains the following:

> "We are led to believe by information received that Bill Truax intends to sell and we hereby give warning to any person or persons wishing to purchase this business that a donation to the Painters' Union will be necessary, the amount to be fixed by the Warren District Trades Assembly, before the building will be declared fair."

Here is an open threat to do injury to anyone who may purchase plaintiffs' business, unless such purchaser shall first submit to an illegal exaction, euphemistically referred to by defendants as a "donation." The threatening and coercive character of this handbill does not have to be inferred. It is expressed in words that cannot be misunderstood.

We might quote further, but enough has been said, we think, to show that some, if not all of these handbills, contain threatening language. They are all scurrilous and abusive, full of opprobrious epithets and defamatory statements. It has been held that such handbills, even though they contain no threats expressed in words, are nevertheless calculated to intimidate and coerce.

Casey v. Cincinnati Typographical Union, 45 Fed. 135;

Seattle Brewing & Malting Co. v. Hansen, 144 Fed. 1011;

Rocky Mountain Bell Tel. Co. v. Montana Federation of Labor, 156 Fed. 809;

My Maryland Lodge No. 186 v. Adt, 100 Md. 238, 59 Atl. 721;

Beck v. Railway Teamsters' Protective Union, 118 Mich. 497, 77 N. W. 13.

In view of the purposes for which this boycott was instituted, and of the means by which it has been carried on, it cannot be doubted that defendants, in employing such means to accomplish such purposes, have exercised coercive pressure upon plaintiffs' customers, actual and prospective, in order to cause them to withhold or withdraw patronage from plaintiffs through fear of loss or damage to themselves should they deal with plaintiffs. In other words, the acts here complained of, constitute what this Court has termed a "secondary boycott."

II.

But for the statute in question (Rev. Stat. Ariz., 1913, Civ. Code, Par. 1464), the secondary boycott described in the complaint could have been enjoined.

Having shown that the complaint in this case charges defendants with having instituted and maintained a secondary boycott, we next inquire whether the boycott so instituted and maintained was lawful or unlawful. First of all, it must be observed that Arizona has no statute on this subject; that is to say, no statute declaring boycotts to be either legal or illegal. The statute under attack (Rev. Stat. Ariz., 1913, Civ. Code, Par. 1464) does not deal with the legality of the acts therein enumerated. It simply says that, in certain cases, no injunction shall issue to restrain the doing of such acts. One wishing to question the legality of such acts is simply relegated to his remedy at law.

In the case at bar, the Supreme Court of Arizona has held that paragraph 1464 forbids the issuance of an injunction to restrain the acts here complained of. Since,

as we have seen, these acts constitute a secondary boycott, it necessarily follows that the court has by its decision construed paragraph 1464 as applying to secondary boycotts, and as placing them beyond the reach of an injunction. However, the court has not held that the secondary boycott is legal, or that one injured by such a boycott may not recover damages therefor. Such a damage suit would, of course, raise the question of the legality of the secondary boycott, but that question could not and cannot be answered by reference to any Arizona statute. Neither is it answered by the decision of the Supreme Court of Arizona in this or any other case.

Having no Arizona statute or decision by which to answer this question, we must look to the common law, as declared by the courts of other jurisdictions. In this way, the question is readily disposed of. The courts of this country, both state and federal, are practically unanimous in holding that a secondary boycott, as above defined and as here exemplified, is wrongful and unlawful.

Gompers v. Buck's Stove & Range Co., 221 U. S. 418, 55 L. Ed. 797, 31 S. Ct. 492;

Duplex Printing Press Co. v. Deering, 254 U. S. 443, 41 S. Ct. 172;

Old Dominion Steamship Co. v. McKenna, 30 Fed. 48;

Casey v. Cincinnati Typographical Union, 45 Fed. 135;

Toledo, Ann Arbor & North Mich. Ry. Co. v. Pennsylvania Co., 54 Fed. 730;

Thomas v. Cincinnati, N. O. & T. P. Ry. Co., 62 Fed. 803;

Hopkins v. Oxley Stave Co., 83 Fed. 912, 28 C. C. A. 99;

Loewe v. California State Federation of Labor, 139 Fed. 71;

Seattle Brewing & Malting Co. v. Hansen, 144 Fed. 1011;

Shine v. Fox Bros. Mfg. Co., 156 Fed. 357, 86 C. C. A. 311;

Rocky Mountain Bell Tel. Co. v. Montana Federation of Labor, 156 Fed. 809;

Irving v. Joint District Council, 180 Fed. 896;

American Federation of Labor v. Buck's Stove & Range Co., 33 App. D. C. 83, 32 L. R. A. (N.S.) 748;

Local Union No. 313 v. Stathakis, 135 Ark, 86, 205 S. W. 450;

Goldberg, Bowen & Co. v. Stablemen's Union, 149 Cal. 429, 86 Pac. 806;

Pierce v. Stablemen's Union, 156 Cal. 70, 103 Pac. 324;

Jordahl v. Hayda, 1 Cal. App. 696, 82 Pac. 1079;

Rosenberg v. Retail Clerks' Assn., 39 Cal. App. 67, 177 Pac. 864;

Moore v. Cooks', Waiters' & Waitresses' Union, 39 Cal. App. 538, 179 Pac. 417;

State v. Glidden, 55 Conn. 46, 8 Atl. 890;

Wilson v. Hey, 232 Ill. 389, 83 N. E. 928;

A. R. Barnes & Co. v. Chicago Typographical Union, 232 Ill. 424, 83 N. E. 940;

Funck v. Farmers' Elevator Co., 142 Iowa 621, 121 N. W. 53;

My Maryland Lodge No. 186 v. Adt, 100 Md. 238, 59 Atl. 721;

Klingel's Pharmacy v. Sharp & Dohme, 104 Md. 218, 64 Atl. 1029;

Burnham v. Dowd, 217 Mass. 351, 104 N. E. 841;

New England Cement Gun Co. v. McGivern, 218 Mass. 198, 105 N. E. 885;

Harvey v. Chapman, 226 Mass. 191, 115 N. E. 304;

W. A. Snow Iron Works v. Chadwick, 227 Mass. 382, 116 N. E. 801;

Beck v. Railway Teamsters' Protective Union, 118 Mich. 497, 77 N. W. 13;

Baldwin v. Escanaba Liquor Dealers' Assn., 165 Mich. 98, 130 N. W. 214;

Gray v. Building Trades Council, 91 Minn. 171, 97 N. W. 663;

Lohse Patent Door Co. v. Fuelle, 215 Mo. 421, 114 S. W. 997;

Clarkson v. Laiblan, 178 Mo. App. 708, 161 S. W. 660;

Ex parte Heffron, 179 Mo. App. 639, 162 S. W. 652;

Hughes v. Kansas City Motion Picture Machine Operators, (Mo. App.), 221 S. W. 95;

Branson v. Industrial Workers of the World, 30 Nev. 270, 95 Pac. 354;

Barr v. Essex Trades Council, 53 N. J. Eq. 101, 30 Atl. 881;

Martin v. McFall, 65 N. J. Eq. 91, 55 Atl. 465;
Alfred W. Booth & Bro. v. Burgess, 72 N. J. Eq. 181, 65 Atl. 226;

George Jonas Glass Co. v. Glass Bottle Blowers' Assn., 72 N. J. Eq. 653, 66 Atl. 953, affirmed in 77 N. J. Eq. 219, 79 Atl. 262;

A. Fink & Sons v. Butchers' Union, 84 N. J. Eq. 638, 95 Atl. 182;

Auburn Draying Co. v. Wardell, 227 N. Y. 1, 124 N. E. 97;

Purvis v. Local No. 500, 214 Pa. 348, 63 Atl. 585;

Webb v. Cooks', Waiters' & Waitresses' Union, (Tex. Civ. App.), 205 S. W. 465;

Cooks', Waiters' & Waitresses' Union v. Papageorge, (Tex. Civ. App.), 230 S. W. 1086;

Crump v. Commonwealth, 84 Va. 927, 6 S. E. 620;

Jensen v. Cooks' & Waiters' Union, 39 Wash. 531, 81 Pac. 1069;

St. Germain v. Bakery & Confectionery Workers' Union, 97 Wash. 282, 166 Pac. 665.

It follows, therefore, that in Arizona, as elsewhere throughout the United States, a secondary boycott is unlawful. It also follows that plaintiffs might have resorted to an action at law to recover of defendants the damages sustained by them in consequence of this particular boycott. Such a remedy, however, would have been wholly inadequate, by reason of the fact (Transcript, p. 4) that defendants are insolvent, and therefore unable to respond in damages for any injury resulting from their acts. Plaintiffs were thus compelled to seek an equitable remedy. This leads us to inquire what

equitable relief an Arizona Court is able to grant in such a case.

The Arizona Constitution (Art. VI, Sec. 6) provides that "the superior court shall have jurisdiction in all cases of equity". This, without more, would undoubtedly authorize the superior court to issue injunctions in all proper cases. However, we are not left to infer this power from the language of the Constitution. There is a statute which expressly confers the power to issue injunctions. This statute is paragraph 1456 of the Civil Code, Revised Statutes of Arizona, 1913, which is but a re-enactment of paragraph 2742 of the Revised Statutes of 1901. It reads as follows:

> "Judges of the superior courts may grant writs of injunction, returnable to said courts, in the following cases:
>
> "1. Where it shall appear that the party applying for such writ is entitled to the relief demanded, and such relief or any part thereof requires the restraint of some act prejudicial to the applicant.
>
> "2. Where, pending litigation, it shall be made to appear that a party is doing some act respecting the subject of litigation, or threatens, or is about to do some act, or is procuring or suffering the same to be done, in violation of the rights of the applicant, which act would tend to render the judgment ineffectual.
>
> "3. In all other cases where the applicant for such writ may show himself entitled thereto under the principles of equity."

Thus we see that the writ of injunction has not been abolished in Arizona, but, on the contrary, that it has been expressly recognized and provided for by statute. The issuance of injunctions under this statute is a matter of daily occurrence. The only requirement is that the applicant must "show himself entitled thereto under the principles of equity." Was the showing made by

plaintiffs sufficient, under the principles of equity, to entitle them to an injunction? What plaintiffs showed was a secondary boycott. Hence the question is whether, under the principles of equity, a secondary boycott will be enjoined. The courts have answered this question in the affirmative.

Gompers v. Buck's Stove & Range Co., 221 U. S. 418, 55 L. Ed. 797, 31 S. Ct. 492;

Duplex Printing Press Co. v. Deering, 254 U. S. 443, 41 S. Ct. 172;

Casey v. Cincinnati Typographical Union, 45 Fed. 135;

Toledo, Ann Arbor & North Mich. Ry. Co. v. Pennsylvania Co., 54 Fed. 730;

Hopkins v. Oxley Stave Co., 83 Fed. 912, 28 C. C. A. 99;

Loewe v. California State Federation of Labor, 139 Fed. 71;

Seattle Brewing & Malting Co. v. Hansen, 144 Fed. 1011;

Shine v. Fox Bros. Mfg. Co., 156 Fed. 357, 86 C. C. A. 311;

Rocky Mountain Bell Tel. Co. v. Montana Federation of Labor, 156 Fed. 809;

Irving v. Joint District Council, 180 Fed. 896;

American Federation of Labor v. Buck's Stove & Range Co., 33 App. D. C. 83, 32 L. R. A. (N.S.) 748;

Local Union No. 313 v. Stathakis, 135 Ark, 86, 205 S. W. 450;

Goldberg, Bowen & Co. v. Stablemen's Union, 149 Cal. 429, 86 Pac. 806;

Pierce v. Stablemen's Union, 156 Cal. 70, 103 Pac. 324;

Jordahl v. Hayda, 1 Cal. App. 696, 82 Pac. 1079;

Rosenberg v. Retail Clerks' Assn., 39 Cal. App. 67, 177 Pac. 864;

Moore v. Cooks', Waiters' & Waitresses' Union, 39 Cal. App. 538, 179 Pac. 417;

Wilson v. Hey, 232 Ill. 389, 83 N. E. 928;

A. R. Barnes & Co. v. Chicago Typographical Union, 232 Ill. 424, 83 N. E. 940;

My Maryland Lodge No. 186 v. Adt, 100 Md. 238, 59 Atl. 721;

Burnham v. Dowd, 217 Mass. 351, 104 N. E. 841;

New England Cement Gun Co. v. McGivern, 218 Mass. 198, 105 N. E. 885;

Harvey v. Chapman, 226 Mass. 191, 115 N. E. 304;

W. A. Snow Iron Works v. Chadwick, 227 Mass. 382, 116 N. E. 801;

Beck v. Railway Teamsters' Protective Union, 118 Mich. 497, 77 N. W. 13;

Baldwin v. Escanaba Liquor Dealers' Assn., 165 Mich. 98, 130 N. W. 214;

Gray v. Building Trades Council, 91 Minn. 171, 97 N. W. 663;

Lohse Patent Door Co. v. Fuelle, 215 Mo. 421, 114 S. W. 997;

Clarkson v. Laiblan, 178 Mo. App. 708, 161 S. W. 660;

Ex parte Heffron, 179 Mo. App. 639, 162 S. W. 652;

Hughes v. Kansas City Motion Picture Machine Operators, (Mo. App.), 221 S. W. 95;

Barr v. Essex Trades Council, 53 N. J. Eq. 101, 30 Atl. 881;

Martin v. McFall, 65 N. J. Eq. 91, 55 Atl. 465;

Alfred W. Booth & Bro. v. Burgess, 72 N. J. Eq. 181, 65 Atl. 226;

George Jonas Glass Co. v. Glass Bottle Blowers' Assn., 72 N. J. Eq. 653, 66 Atl. 953, affirmed in 77 N. J. Eq. 219, 79 Atl. 262;

A. Fink &Sons v. Butchers' Union, 84 N. J. Eq. 638, 95 Atl. 182;

Auburn Draying Co. v. Wardell, 227 N. Y. 1, 124 N. E. 97;

Purvis v. Local No. 500, 214 Pa. 348, 63 Atl. 585;

Webb v. Cooks', Waiters' & Waitresses' Union, (Tex. Civ. App.), 205 S. W. 465;

Cooks', Waiters' & Waitresses' Union v. Papageorge, (Tex. Civ. App.), 230 S. W. 1086;

Jensen v. Cooks' & Waiters' Union, 39 Wash. 531, 81 Pac. 1069;

St. Germain v. Bakery & Confectionery Workers' Union, 97 Wash. 282, 166 Pac. 665.

Having shown that plaintiffs in their complaint charge defendants with having instituted and maintained a secondary boycott of plaintiffs and their business; that in

Arizona, as elsewhere, such a boycott is wrongful and unlawful; that, because of the insolvency of defendants, plaintiffs are without any adequate remedy at law; that, under the principles of equity, a secondary boycott may be enjoined; and that plaintiffs, under paragraph 1456 of the Civil Code, are therefore entitled to an injunction; we next inquire the reason why the courts of Arizona have denied them such relief.

The reason may be readily ascertained. In paragraph X of the complaint (Transcript, pp. 4, 5) it is alleged that, in doing each and all of the acts complained of, defendants have relied and are relying on, and have claimed and are claiming to be justified and protected by, the provisions of paragraph 1464 of the Civil Code, Revised Statutes of Arizona, 1913, which reads as follows:

> "No restraining order or injunction shall be granted by any court of this state, or a judge or the judges thereof in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving or growing out of a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property or to a property right of the party making the application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney. And no such restraining order or injunction shall prohibit any person or persons from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at or near a house or place where any person resides or works, or carries on business, or happens to be for the purpose of peacefully obtaining or communicating in-

formation, or of peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute; or from recommending, advising, or persuading others by peaceful means so to do; or from paying or giving to or withholding from any person engaged in such dispute any strike benefits or other moneys or things of value; or from peaceably assembling at any place in a lawful manner and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto."

The complaint further alleges that paragraph 1464 violates and contravenes the Fourteenth Amendment to the Constitution of the United States, by depriving plaintiffs of their property without due process of law, and by denying to them the equal protection of the laws of the State of Arizona, and that said paragraph 1464 is therefore null, void and of no effect.

Defendants in their demurrer invoke paragraph 1464, stating, as the ground of their demurrer, that the property and property rights (that is, plaintiffs' business and the right to carry on such business) which are in the complaint alleged to be in danger of irreparable injury, are not property or property rights within the meaning of paragraph 1464, and that, in view of the provisions of said paragraph 1464, no injunction can be issued to prevent such injury.

The Superior Court rendered judgment (Transcript, pp. 15, 16) sustaining this demurrer, and the judgment so rendered has been affirmed by the Supreme Court of Arizona (Transcript, pp. 17-20, 20 Ariz. 7, 176 Pac. 570). The Supreme Court holds (Transcript, p. 20, 20 Ariz. 12, 176 Pac. 572) that "the facts stated in the complaint are insufficient to constitute a cause of action or justify the relief demanded." This holding is based upon the ground that paragraph 1464 of the Civil Code for-

bids the issuance of the injunction prayed for. That such is the basis of the court's holding is evident from the following expressions, which we quote from the opinion:

"In this appeal, the appellants have confined their contentions of error to constitutional questions, solely relying upon the alleged conflict of Par. 1464, R. S. A. 1913, with the Fourteenth Amendment to the United States Constitution, in the particulars that said statute deprives the plaintiffs of property without due process of law, and denies to the plaintiff the equal protection of the law. The appellants in their brief frankly state that, 'the sole question here presented is as to the constitutionality of Par. 1464 of the Civil Code of Ariz. 1913.'" (Transcript, p. 18, 20 Ariz. 8, 176 Pac. 571).

"The said statute, if valid, clearly prohibits the courts from issuing such orders in such cases, 'unless necessary to prevent irreparable injury to property or to a property right of the party making the application for which injury there is no adequate remedy at law, and such property or property right must be described particularly in the application.' The complaint is quite clear that the course pursued by the defendants in advertising the existence of the strike, and appealing to the public in general to help the defendants win the strike has had the effect of reducing the volume of plaintiffs' business by causing many persons favorably inclined to deal with plaintiffs to refrain from doing so. The so-called boycott was instituted for that very purpose, without any doubt, and has proven effective. The good will of the public towards the plaintiffs was successfully attacked by the defendants and temporarily limited to those of the public who were not persuaded by the recommendations, advice and appeals made by the defendants." (Transcript, p. 18, 20 Ariz. 9, 176 Pac. 571).

"The purpose of the statute in question is to recognize the right of workmen on strike to use peaceable means to accomplish the lawful ends for which the strike is called. The statute adopts the view of a

number of courts which have held 'picketing,' if peaceably carried on for a lawful purpose to be no violation of any legal right of the party whose place of business is 'picketed', and whether as a fact the picketing is carried on by peaceful means, as against the other view taken by the federal courts and many of the state courts, that picketing is per se unlawful. The last view is that contended for by the appellant. The contention is that the statute having attempted to legalize picketing when peaceably carried on for any purpose deprives plaintiffs of its property without due process of law and denies to plaintiffs the equal protection of the law. Conceding that prior to the enactment of Par. 1464 supra, the state of the law in this jurisdiction was as contended, that is, that picketing carried on in any manner, in a concededly peaceable manner, was an unlawful act—as held by a great number of courts—in other words—that picketing naturally induces breaches of the peace, and is therefore unlawful; yet plaintiffs have no vested right to have the law continue in that state. A change in the law so that when it is made to appear that peaceable picketing is in fact carried on, and all picketing is no longer conclusively presumed to be unlawful, as recognized by the said statute, that change in the law places the burden upon the plaintiff to show as a fact that defendant violates the law while the other view presumed that the law was violated if any manner of picketing was carried on. The statute simply deals with a rule of evidence requiring the courts to substitute evidence of the nature of the act for a presumption of the nature of the act, based upon an inference from the bare act. Hence, it is quite clear that the statute recognizes the right of striking employees to carry on a campaign of picketing in furtherance of a strike for a lawful purpose; provided the means used and the manner in which such means are used are peaceable and otherwise violate no legal rights of the party whose premises are subjected to the picketing, and are not in violation of

any duty owing by the striking employees to such party or to the public. In no sense can the statute be considered as one either depriving the plaintiffs of property without due process of law, or denying plaintiffs the equal protection of the law. The plaintiffs' property rights are not invaded by picketing unless the picketing interferes with the free conduct of the business by the plaintiffs; and plaintiffs do not claim that defendants have by using violent means with picketing invaded their rights in this respect, by causing a loss in business. If such nature of picketing should be charged and established by proof, plaintiffs would be entitled to relief to the extent of prohibiting the use of violence in any form. By the statute, the plaintiffs are deprived of an order restraining peaceful, not violent, unlawful acts, and to entitle a plaintiff to an order restraining violent unlawful acts, he is required to set forth facts sufficient to constitute such acts as amount to unlawful acts and sustain such complaint by substantial evidence. The statute conflicts with neither constitutional provision invoked." (Transcript, p. 19, 20 Ariz. 11, 176 Pac. 572).

Throughout the opinion, the court exhibits a marked unwillingness to call things by their right names. For instance, the boycott described in the complaint is referred to in the opinion, in one place, as "the course pursued by defendants in advertising the existence of the strike, and appealing to the public in general to help the defendants win the strike." In another place it is referred to as "the so-called boycott." In other places it is referred to as "picketing," "picketing peaceably carried on for a lawful purpose," "picketing carried on by peaceful means," "picketing carried on in a concededly peaceable manner," "peaceable picketing," "a campaign of picketing in furtherance of a strike for a lawful purpose," and as "peaceful, not violent, unlawful acts."

It must be borne in mind, however, that, where the

court employs these euphemisms, what it is actually talking about is a secondary boycott. So, when the court says that "by the statute the plaintiffs are deprived of an order restraining peaceable, not violent, unlawful acts," what it actually means to hold, and does necessarily hold, is that, by the statute in question (paragraph 1464 of the Civil Code), plaintiffs are deprived of the right to enjoin a secondary boycott. The court does not dispute the proposition that prior to the enactment of paragraph 1464, such a boycott could have been enjoined. In view of the provisions of paragraph 1456, authorizing injunctions in all cases "where the applicant for such writ shows himself entitled thereto under the principles of equity," the proposition could not and cannot be successfully challenged. The result is that by paragraph 1464, as construed by the Supreme Court of Arizona, plaintiffs are deprived of the right which they would otherwise have had to enjoin a secondary boycott.

It is true the court could and probably should have adopted a different construction. Paragraph 1464 of the Civil Code is practically identical with section 20 of the Clayton Act (38 Stat. at L. 738), except that paragraph 1464 does not contain the concluding words of section 20, "nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States," or any equivalent words. Paragraph 1464 also omits the words "and lawful" from the phrase "recommending, advising or persuading others by peaceful and lawful means so to do," found in section 20. There is no other material difference between the two statutes. So the Supreme Court of Arizona might well have construed paragraph 1464 as this Court, in the case of *Duplex Printing Press Co. v. Deering*, 254 U. S. 443, 41 S. Ct. 172, construed section 20 of the Clayton

Act. That is to say, paragraph 1464 might properly and reasonably have been construed as not forbidding the issuance of an injunction to restrain a secondary boycott, such as is shown by the complaint in this case. So construed, the statute would have been free from the constitutional objections raised here.

Such a construction was urged upon the court in the case of *Truax v. Bisbee Local No. 380*, 19 Ariz. 379, 171 Pac. 121, wherein the undisputed facts were identical with those alleged in the complaint in this case. The court, however, declined to adopt the suggested construction, and in that case, as well as in the case at bar, held paragraph 1464 applicable to the facts existing here. In other words, the court has held in both cases that an injunction to restrain a secondary boycott, in a case involving or growing out of a labor dispute, is forbidden by paragraph 1464 of the Civil Code.

Whether the construction thus placed upon the statute by the Supreme Court of Arizona is right or wrong is, of course, immaterial here. The fact that this Court has placed a different construction upon a similar statute is likewise immaterial. The statute having been construed by the highest court of the State, that construction, however erroneous, becomes an integral part of the statute itself, and must necessarily be accepted by this Court. Paragraph 1464 must, therefore, be treated as if it specifically enumerated the acts here complained of, and expressly forbade the issuance of any injunction to restrain such acts; or as if it declared in so many words, that in cases involving or growing out of labor disputes, no secondary boycott should ever be enjoined.

III.

In depriving plaintiffs of the right, which they would otherwise have had, to enjoin the secondary boycott de-

scribed in the complaint, while leaving the remedy by injunction still available to other litigants, the statute in question denies to plaintiffs the equal protection of the laws, contrary to the Fourteenth Amendment to the Constitution of the United States.

It must be remembered that the limitation which paragraph 1464 imposes upon the power to grant injunctions does not apply in all cases, but only in those between employers and employees, or between employees, or between persons employed and persons seeking employment, involving or growing out of a dispute concerning terms or conditions of employment. In all other cases, secondary boycotts may still be enjoined. If this were not a case between employers and employees, or if the case grew out of something other than a labor dispute, the facts being in all other respects as they are now, plaintiffs would be able, under the provisions of paragraph 1456 of the Civil Code, to enjoin the boycott here complained of. Plaintiffs are denied this remedy, not because they have failed to show themselves entitled to it, but simply because the parties who are carrying on the boycott happen to be former employees, with whom plaintiffs have had a labor dispute. If defendants had chosen as their victim some person for whom they had never worked, and had done to him what they are doing to plaintiffs, such person would be protected by injunction. Plaintiffs are denied such protection simply because, in their case, the wrong-doers are persons who once worked for them, and had a disagreement with them concerning the terms and conditions of their employment.

It must also be remembered that, even in cases between employers and employees, or between employees, or between persons employed and persons seeking employment, involving or growing out of labor disputes, the

courts are not forbidden by this statute to enjoin the destruction of tangible property by persons engaging in a secondary boycott, but that, as construed by the Arizona Supreme Court, the statute does forbid the issuance of any injunction to restrain such boycotters from destroying a certain kind of intangible property, namely, one's business and the right to carry on such business as he sees fit. If, instead of seeking to destroy plaintiffs' business, defendants had attempted to destroy the building in which that business is conducted, or if they had attempted the destruction of any other tangible property, the owner of such building or other property would have been able to protect it by injunction. Plaintiffs are denied such protection for their property, simply because it happens to consist merely of their business, which, of course, is property, and of their right to do business, which, as every one knows, is a property right.

Sailors' Union of the Pacific v. Hammond Lumber Co., 156 Fed. 450, 85 C. C. A. 16;

Bailey v. People, 190 Ill. 28, 60 N. E. 98;

Baldwin v. Escanaba Liquor Dealers' Assn., 165 Mich. 98, 130 N. W. 214;

Gray v. Building Trades Council, 91 Minn. 171, 97 N. W. 663;

Lohse Patent Door Co. v. Fuelle, 215 Mo. 421, 114 S. W. 997;

Barr v. Essex Trades Council, 53 N. J. Eq. 101, 30 Atl. 881;

State v. Chapman, 69 N. J. L. 464, 55 Atl. 94;

Purvis v. Local No. 500, 214 Pa. 348, 63 Atl. 585.

Thus it is seen that the statute, as construed by the Arizona Supreme Court, discriminates against plaintiffs,

(1) by reason of the class to which they belong, and (2) by reason of the class to which their property belongs.

The victims of secondary boycotts are divided into two classes. One of these is a protected class, the other an unprotected class. The protected class consists of those who are not parties to any labor dispute, but are being boycotted for some other reason. They are permitted to resort to equity as heretofore, and are granted injunctions when necessary to restrain the boycotters from destroying their property. The unprotected class consists of those, either employers or employees, who are being boycotted as a result of some labor dispute. The statute, as construed, deprives them of any right whatever to enjoin the destruction of their property by those engaging in such boycott. Plaintiffs belong to this unprotected class.

Property also is divided into two classes, one a protected class, the other an unprotected class. The protected class includes all tangible property and all intangible property other than business and the right to do business. The owners of property belonging to this protected class are permitted to resort to equity as heretofore, and are granted injunctions when necessary to prevent the destruction of their property by persons engaging in a secondary boycott, even though such boycott is the result of a labor dispute to which the owners of such property are parties. The unprotected class of property consists exclusively of business and the right to do business. The statute, as construed, deprives the owners of this class of property of any right whatever to enjoin its destruction by persons engaging in a secondary boycott. Plaintiffs' property belongs to this unprotected class.

Such are the classifications upon which the discrimination is based. Whether the discrimination can be jus-

tified upon any such basis, in view of the equal protection clause of the Fourteenth Amendment, remains to be considered. The limitations which the Fourteenth Amendment imposes upon the power of classification were pointed out by Mr. Justice Brewer, speaking for this Court, in the case of *Gulf, C. & S. F. Ry. Co. v. Ellis*, 165 U. S. 150, 41 L. Ed. 666, 17 S. Ct. 255, as follows:

> "But it is said that it is not within the scope of the 14th Amendment to withhold from states the power of classification, and that if the law deals alike with all of a certain class it is not obnoxious to the charge of a denial of equal protection. While, as a general proposition, this is undeniably true, * * * yet it is equally true that such classification cannot be made arbitrarily. The state may not say that all white men shall be subjected to the payment of the attorneys' fees of parties successfully suing them, and all black men not. It may not say that all men beyond a certain age shall be alone thus subjected, or all men possessed of a certain wealth. These are distinctions which do not furnish any proper basis for the attempted classification. That must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis. * * * Unless the legislature may arbitrarily select one corporation or one class of corporations, one individual or one class of individuals, and visit a penalty upon them which is not imposed upon others guilty of like delinquency, this statute cannot be sustained. But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the 14th Amendment forbids this. * * * It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the 14th Amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground—some differ-

ence which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection."

This doctrine, long since grown familiar, has been reiterated in many later cases. A recent instance is the case of *Southern Ry. Co. v. Greene*, 216 U. S. 400, 54 L. Ed. 536, 30 S. Ct. 287, wherein Mr. Justice Day, delivering the opinion of the Court, said:

> "The equal protection of the laws means subjection to equal laws, applying alike to all in the same situation. * * * While reasonable classification is permitted without doing violence to the equal protection of the laws, such classification must be based upon some real and substantial distinction, bearing a reasonable and just relation to the things in respect to which such classification is imposed; and classification cannot be arbitrarily made without any substantial basis. Arbitrary selection, it has been said, cannot be justified by calling it classification."

Other cases in which the rule has been recognized and applied are as follows:

Yick Wo v. Hopkins, 118 U. S. 356, 30 L. Ed. 220, 6 S. Ct. 1064;

Atchison, T. & S. F. Ry. Co. v. Matthews, 174 U. S. 96, 43 L. Ed. 909, 19 S. Ct. 609;

Cotting v. Kansas City Stock Yards Co., 183 U. S. 79, 46 L. Ed. 92, 22 S. Ct. 30;

Connolly v. Union Sewer Pipe Co., 184 U. S. 540, 46 L. Ed. 679, 22 S. Ct. 431;

Atchison, T. & S. F. Ry. Co. v. Vosburg, 238 U. S. 56, 59 L. Ed. 1199, 35 S. Ct. 675.

When paragraph 1464 is examined in the light of these principles, what do we find? We find that it is a

statute relating to injunctions; that its object is to restrict the power of courts to grant injunctions; that, in accomplishing this object, it designates a certain class of persons, who shall no longer have the right to enjoin the commission of certain specified wrongs, but that the right to enjoin the commission of such wrongs is still to be possessed by all other persons. We find, also, that the statute designates a certain class of property, the destruction of which shall not, under certain circumstances, be prevented by injunction, but that, under the same circumstances, injunctions are still to be issued to prevent the destruction of all other kinds of property.

By these classifications, a remedy freely granted to one person is withheld from another, though they both stand in the same situation. The right sought to be protected, the wrong sought to be prevented, the remedy sought to be applied, the propriety of the remedy, the urgency of the need, the form of the action, the pleadings, the proofs—all the facts and all the equities—may be the same in the one case as in the other; and yet the remedy which the court grants to the one applicant must be withheld from the other, simply because of the accidental and wholly irrevelant circumstance that this applicant once employed the wrong-doers, and had a disagreement with them concerning the terms and conditions of such employment and that the wrong is being committed because of that disagreement; coupled with the further accidental and irrelevant fact that the property which this applicant seeks to protect is not of a tangible character, but consists merely of his business and of his right to conduct that business in such lawful manner as he sees fit.

Is not this as arbitrary and capricious, as unreasonable and oppressive, as if the statute had said that injunctions should be granted to white men and withheld

from colored men, or granted to Protestants and withheld from Catholics, or granted to Democrats and withheld from Republicans? Might it not as well have said that injunctions should issue to protect real estate, but not personal property, or to protect brick houses, but not wooden houses, or to protect houses situated on even-numbered lots, but not those on odd-numbered lots? Can it be said that the distinction upon which the classification is based bears any reasonable or just relation to the thing in respect to which the classification is imposed?

That the equal protection guaranteed by the Fourteenth Amendment includes the right of equal access to the courts for the protection of person and property, and for the prevention and redress of wrongs, cannot be questioned. As was said by Mr. Justice Field, speaking for this Court, in the case of *Barbier v. Connolly*, 113 U. S. 27, 28 L. Ed. 923, 5 S. Ct. 357:

> "The 14th Amendment, in declaring that no State 'shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws,' undoubtedly intended, not only that there should be no arbitrary deprivation of life or liberty or arbitrary spoliation of property but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; *that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts;* that no impediment should be interposed to the pursuits of anyone except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and conditions, and that in the administration of criminal justice

no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses." (Our italics).

Thanks to the good sense and fair-mindedness of legislatures generally, attempts to deny this right of equal access to the courts have been comparatively few and infrequent. Examples, however, have not been wanting. In the case of *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 46 L. Ed. 679, 22 S. St. 431, this Court dealt with an Illinois statute which declared that combinations for certain purposes should be unlawful, and that persons, firms or corporations engaging in such combinations should not have the right to recover the purchase price of any article or commodity sold within the state, but that the provisions of the statute should not apply to combinations in respect of agricultural products or live stock in the hands of the producer or raiser. This Court held the statute unconstitutional, as amounting to a clear denial of the equal protection guaranteed by the Fourteenth Amendment.

Other statutes attempting arbitrarily to deprive some persons of judicial remedies or defenses allowed to others have been held unconstitutional in the following cases:

Johnson v. Goodyear Mining Co., 127 Cal. 4, 59 Pac. 304;

Black v. Seal, 6 Houst. (Del.) 541;

Hecker v. Illinois Cent. R. Co., 231 Ill. 574, 83 N. E. 456;

Green v. Red Cross Medical Service Co., 232 Ill. 616, 83 N. E. 1081;

Zolnowski v. Illinois Steel Co., 233 Ill. 299, 84 N. E. 225;

Reinhardt v. Chicago Junction Ry. Co., 235 Ill. 576, 85 N. E. 605;

Funkhouser v. Randolph, 287 Ill. 94, 122 N. E. 144;

Cincinnati, N. O. & T. P. Ry. Co. v. Clark, 11 Ky. L. 286, 808;

German Ins. Co. v. Miller, 12 Ky. L. 138;

Pearson v. City of Portland, 69 Me. 278, 31 Am. Rep. 276;

In re Opinion of Justices, 211 Mass. 618, 98 N. E. 337;

Bogni v. Perotti, 224 Mass. 152, 112 N. E. 853;

In re Flukes, 157 Mo. 125, 57 S. W. 545;

Houston v. Pulitzer Pub. Co., 249 Mo. 332, 155 S. W. 1068;

McClung v. Pulitzer Pub. Co., (Mo.), 214 S. W. 193;

Hargraves Mills v. Harden, 56 N. Y. Supp. 937, 25 Misc. 665;

Rosin v. Lidgerwood Mfg. Co., 86 N. Y. Supp. 49, 89 App. Div. 245;

Wally's Heirs v. Kennedy, 2 Yerg. (Tenn.) 554, 24 Am. Dec. 511;

Phipps v. Wisconsin Cent. Ry. Co., 133 Wis. 153, 113 N. W. 456;

Kiley v. Chicago, M. & St. P. Ry. Co., 138 Wis. 215, 119 N. W. 309;

State v. Wisconsin-Minnesota Light & Power Co., 165 Wis. 430, 162 N. W. 433.

Of all these cases the one which most nearly resembles the case at bar is that of *Bogni v. Perotti*, 224 Mass. 152, 112 N. E. 853. In principle the two cases are indistinguishable. In the Massachusetts case the court dealt with what might be termed the Massachusetts version of paragraph 1464. The Massachusetts statute provided that—

> "no restraining order or injunction shall be granted by any court of the Commonwealth or by any judge thereof in any case between an employer and employees, or between employers and employees, or between persons employed and persons seeking employment, or involving or growing out of a dispute concerning terms or conditions of employment, or any act or acts done in pursuance thereof, unless such order or injunction be necessary to prevent irreparable injury to property or to a property right of the party making the application."

The Massachusetts statute further provided that:

> "In construing this act, the right * * * to do work and labor as an employee shall be held and construed to be a personal and not a property right."

Because of this statute, the trial court had refused to enjoin the members of one labor union from causing or attempting to cause the discharge of the members of another labor union from their employment by threatening or intimidating their employers. The Supreme Judicial Court reversed this decree, and held the statute to be in violation of the Fourteenth Amendment to the Constitution of the United States. After first showing that the statute amounted to a deprivation of property without due process of law, the court said:

> "A further effect of the present statute is to deprive the plaintiffs of the equal protection of the laws. The statute provides in substance that the property right to labor of any individual or number

of individuals associated together shall not be recognized in equity as property when assailed by a labor combination, unless irreparable damage is about to be committed and that no relief by injunction shall be granted save in like cases for which there is no relief at law. That a man cannot resort to equity respecting his property right to work in the ordinary case simply because he is a laboring man, and that he cannot have the benefit of an injunction when such remedies are open freely to owners of other kinds of property, needs scarcely more than a statement to demonstrate that such a man is not guarded in his property rights under the law to the same extent as others. If a laborer must stand helpless in a court while others there receive protection respecting the same general subject which is denied to him, it cannot be said with a due regard to the meaning of constitutional guarantees that he is afforded 'the equal protection of the laws' within the Fourteenth Amendment to the Constitution of the United States and similar provisions of our own Constitution. The right to make contracts to earn money by labor is at least as essential to the laborer as is any property right to other members of society. If as much protection is not given by the laws to this property, which often may be the owner's only substantial asset, as is given other kinds of property, the laborer stands on a plane inferior to that of other property owners. Absolute equality before the law is a fundamental principle of our own Constitution. To the extent that the laborer is not given the same security to his property by the law that is granted to the landowner or capitalist, to that extent discrimination is exercised against him. It is an essential element of equal protection of the laws that each person shall possess the unhampered right to assert in the courts his rights without discrimination, by the same processes against those who wrong him as are open to every other person. The courts must be open to all upon the same terms. No ob-

stacles can be thrown in the way of some which are not interposed in the path of others. Recourse to the law by all alike without partiality or favor, for the vindication of rights and the redress of wrongs, is essential to equality before the law. * * * It has been argued that since the equitable jurisdiction of the court is largely statutory, * * * it may be curtailed by the Legislature in respect of the power to grant injunctions. It is one thing to affect the scope of equity by extending or restricting the branches of that jurisprudence which courts may administer; it is a quite different matter to enact that some citizens may resort to it, while others may not. Without discussing other aspects of this proposition, it is enough to say that the power of courts to afford injunctive relief cannot be impaired by the Legislature in such a way as to prevent its use in favor of one property owner, when it is preserved for the benefit of other property owners."

What the Massachusetts court says of the laborer and of his right to work is equally true of the tradesman and of his right to do business. To the tradesman, with his right to do business, as to the laborer, with his right to work, the state is required by the Fourteenth Amendment to accord protection equal to that which it accords to any other property owner or to any other property. If the equal protection of the laws is denied to a laborer by a statute which forbids the issuance of an injunction to protect his right to work, while leaving the remedy by injunction still available to all other property owners, the same thing must be true of a statute which forbids the issuance of an injunction to protect a restaurant-keeper in his right to do business, while to other property owners, similarly situated, the remedy by injunction is still available.

The judgment of the Supreme Court of Arizona should be reversed, and paragraph 1464 of the Civil Code, Re-

vised Statutes of Arizona, 1913, should be declared unconstitutional and void.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1921.

No. 13.

WILLIAM TRUAX ET AL, PLAINTIFFS IN ERROR.

vs.

MICHAEL CORRIGAN ET AL, DEFENDANTS IN ERROR.

Supplemental Brief On Behalf of Defendants In Error.

Some Additional Authorities.

Since the time of the argument of this case the questions involved have received additional consideration at the hands of several courts. For instance in the case of Reardon *vs.* Caton, 178 N. Y. Supp., 713, on page 719, the court says:

> "When men attempt to assert what they claim to be their rights in good faith, in a decent, orderly way, without resort to violence and within the law, their interests are as sacred as those of the plaintiff, and a court of equity should see to it that they are not improperly interfered with by the writ of injunction."

In the case of Greenfeld *vs.* Central Labor Council, 192 Pacific, 783, the relation of employer and employe with terms and conditions of employment was held continued notwithstanding a strike and after it was called. In the same case an Oregon Act repeating Sec. 20 of the Clayton Act was held constitutional.

In the case of Kinloch Telephone Co. *vs.* Local Union 265 Fed., 312, the court treated the Clayton Act as constitutional and remarked, as to cases holding that there could be no peaceful picketing, that "none of them held in judgment the provisions of the Clayton Act."

Further Considerations.

The prime and, as we consider it, the only question involved in this case is the constitutionality under the Federal Constitution of the state statute. In our view it is immaterial whether, under the facts in this case, had there been no statute, the court below might have issued an injunction. We say this because another view might bring to this court every industrial conflict in which an injunction was sought on the theory that the plaintiff had not been accorded equal protection of the laws. Suppose, for instance, there had been no statute in Arizona such as the one in question, and the plaintiff had undertaken an appeal to this court on the theory that his constitutional rights were interfered with. We take it that, without doubt, this court would dismiss the case. The situation is in no wise changed by any suggestions that the defendants exceeded the proper limits of liberty accorded them by the statute. The question becomes one simply whether the statutory provisions in and of themselves infringe upon constitutional rights.

We have sufficiently pointed out in the original brief that no court has yet undertaken to doubt the consti-

tutionality of the Clayton Act, and that in its absence or in the absence of a similar statute, a very large percentage of the highest courts of the Union have held that picketing not accompanied by disorder is lawful. Under the necessary contentions of the plaintiff in error all of such cases could have been brought to the Supreme Court of the United States on the theory that constitutional rights were involved.

What should be the attitude of courts in dealing with questions of this nature? We take it that the time has expired by limitation when it can be held to be the duty of a good judge to enlarge his jurisdiction in such manner as to interfere with the natural and guaranteed rights of the citizen. One of these rights is to freely communicate to his fellows whatever may be in his thoughts or may be esteemed to further his social, political, or other interests, restrained only by his obligation to answer in a civil court by damages and in a criminal court by fine or imprisonment. It is not right that a judge should create offenses to be punished by a court of equity, where the right of trial by jury is ordinarily denied, and the presiding judge is too often a man who feels that the violation of an order he has himself signed is personal to himself.

Resolved into its simpler elements the contest between the plaintiffs and defendants is one finding its main springs in self-interest, a situation which can only be considered as having brought about many of our advances in civilization. The employer actuated by self interest concludes that long hours of labor or low rates of pay should be maintained. The employee, desiring greater leisure or a higher degree of comfort, takes the opposite view. The contending elements are obliged to make their appeal to the public. If the employer's theory is one which, under the circumstances of the case, attracts general sympathy,

he may hope to succeed and conversely as to the employees. This is a contest in which either or both of the parties may be inconvenienced, but not a contest which should commend itself from any point of view to a court of equity. Whatever of inconveniences there may be to the public in the present existence of this and like contests, in the long run, the community at large, not having found a better system of adjusting industrial differences, will be the gainer from the conflict, at least as a rule, for out of the disturbance all things will find their true level.

We take it that the natural rights of employer or employee, assuming it to be proper to invoke natural rights in a court of equity, are correlative and may be summed up as follows:

The employer has the right:

To discard or employ Union labor;
To so notify the public;
To appeal to the public for sympathy in his position.

The employee has the right:

To refuse longer to work for the employer;
To state his grievances to the public and to notify every one of his understanding of the position of the employer;
To ask public sympathy in his own position.

The employee may do all of these things in a rude or crude way, but a court of equity is not a court of manners. By his pertinacity, he may offend the sensibilities off the employer. The court is not to measure the percentage of his persistence. It may be that his actions will result in injury to the employer, but mere injury gives no right of action. The simple act of abstaiming from work might well affect an employer more seriously than any picketing, which merely makes known to the public the fact of the existence of a quarrel.

Competition may as well take the form of rival appeals to the public as between union and employer, as it could between rival merchants by the advertisement of competing products, or, if you will, the institution of new improvements rendering old property valueless. As said in Cooke on the Law of Combinations, Monopolies and Labor Unions, Sec. 9: "The introduction of the term 'injury to business' serves to make more plausible the doctrine that merely inducing a refusal to deal, is unlawful. But, in the view we take, an injury to business 'has no independent existence."

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1919.

No. 307.

WILLIAM TRUAX ET AL., PLAINTIFFS IN ERROR,

vs.

MICHAEL CORRIGAN ET AL., DEFENDANTS IN ERROR.

BRIEF FOR DEFENDANTS IN ERROR.

Statement of the Case.

As is set out at length in the brief of plaintiffs in error, this suit is brought because of so-called picketing indulged in by the defendants consequent upon labor difficulties affecting the plaintiffs' business establishment at Bisbee, Ariz. The defendants are charged with having caused certain persons to walk back and forth in front of plaintiffs' restaurant bearing banners which were easily legible from either side of the street, and from a great distance in other directions, which banners pointed out the existence of a dispute between plaintiffs and defendants and described plaintiffs' establishment as unfair. It is further said that the defendants and other persons caused persons to attend at or near the entrance to the restaurant and to hand to plaintiffs' customers and patrons, hand bills referring to plaintiffs and their restaurant as being unfair, and advising and persuading,

or attempting so to do, plaintiffs' customers to cease from patronizing the plaintiffs. It is said that the defendants and other persons unknown to plaintiffs caused persons to attend at or near the entrance to said restaurant when it was open for business and announce and proclaim repeatedly in a voice audible for a great distance that plaintiffs' restaurant was unfair, and recommended, etc., plaintiffs' customers and patrons and other persons to refrain from patronizing or trading with plaintiffs in their restaurant.

As a consequence it is charged that plaintiffs' patronage fell off to the extent of over one-half.

It is further set up that in the doing of the several acts defendants were relying upon the provisions of Paragraph 1464 of the Civil Code, Revised Statutes of Arizona, 1913, reading as follows:

> "No restraining order or injunction shall be granted by any court of this State, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between, employees, or between persons employed and persons seeking employment, involving or growing out of a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property or to a property right of the party making the application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.
>
> "And no such restraining order or injunction shall prohibit any person or persons from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at or near a house or place where any person resides or works, or carries on business, or happens to be for the

purpose of peacefully obtaining or communicating information, or of peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute; or from commending, advising, or persuading others by peaceful means so to do; or from paying or giving to or withholding from any person engaged in such dispute any strike benefits or other moneys or things of value; or from peaceably assembling at any place in a lawful manner and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto."

It is further said that such paragraph violates and contravenes the Fourteenth Amendment to the Constitution of the United States by depriving plaintiffs of their property without due process of law and denying them the equal protection of the laws of the State of Arizona, and that such paragraph is null and void.

It was asked that all of the defendants be restrained from inaugurating, carrying on or taking part in such a "boycott" as has been set forth, or from inducing persons to cease or refrain from patronizing or trading with plaintiffs and carrying or displaying banners or other device calling attention to the dispute between plaintiffs and defendants, or referring to them or their restaurant as being "unfair," or recommending, advising, persuading or attempting to persuade any person to refrain from patronizing them, and from writing, printing, etc., or circulating any handbills calling attention to such dispute, or referring to plaintiffs or their restaurant as unfair, or recommending, etc., any person to cease from patronizing plaintiffs, and from orally or otherwise advertising or calling attention to any such boycott or dispute, or referring to plaintiffs or their restaurant as unfair, or recommending any person to cease from patronizing it, and generally from doing any act for the

purpose of coercing plaintiffs to comply with any demands of defendants, or coercing them to settle any dispute between the parties.

It is further specifically asked that Paragraph 1464 of the Civil Code be declared unconstitutional.

A large number of exhibits are attached to the complaint, consisting of the hand bills which were circulated prejudicial to plaintiffs' business as claimed.

A demurrer was filed to the complaint (Rec., p. 15) alleging that it did not state facts sufficient to constitute a cause of action in that the property rights referred to in said complaint and which the said complaint alleged as irreparably injured, and from which the plaintiffs had suffered great and irreparable loss and damage, was not such property as under section 1464 was contemplated or included as property or property rights, the irreparable injury of which might be enjoined.

Upon consideration of the demurrer it was sustained in the lower court and, on appeal, the action of the lower court was affirmed in the Supreme Court of Arizona (Rec. pp. 17 to 20).

The Essence of the Bill.

It is notable that the issue in this case is confined within a much smaller compass than is usual in cases of this description. There is no allegation of violence or threat of violence. It is not suggested that plaintiffs' patrons have been interfered with in their entrance to or egress from plaintiffs' restaurant, nor that they were rudely accosted. It is not suggested that the defendants' actions have been indulged in for any other purpose than bringing about a settlement of the dispute between the parties; nor is it suggested at any point that plaintiffs' patrons are themselves to suffer directly or indirectly from continuing to extend their patronage to the plaintiffs. It is not contended that the defendants

have libeled or misrepresented the plaintiffs, or that they have done anything except to present to the public their own side of the existing dispute. The case, therefore, is to be differentiated from practically every other controversy brought before the courts and in which injunctive relief has been granted. The bare issue presented in this case is whether peaceable persuasion by circulars, banners and word of mouth is intrinsically unlawful, and by its very existence unlawfully takes away from the plaintiffs some property or property rights belonging to them.

ARGUMENT.

We have just stated what must be regarded as the sole issue in the case, which is, whether peaceable persuasion by printed circulars, banners, or word of mouth in such case as this, invades property or property rights of the plaintiffs. While the question, as we shall find, has been most largely discussed in picketing cases, yet, analyzing this situation, the picketing is purely incidental. In the present instance it is a means adopted, by the methods referred to, to convey to the public information of the fact that plaintiffs' establishment was deemed unfair. This "picketing" can not be regarded in any other light, because no State or municipal law has been violated by the "pickets," and the ingress and egress of customers has not been interfered with. The situation is not otherwise than it would have been had all the persons communicating the information resorted to the mails or stationed themselves a hundred yards away from plaintiffs' place of business. We shall, nevertheless, later on, discuss the authorities relative to the general subject of picketing as they will shed important light upon the question at issue.

If property or a property right belonging to the plaintiffs has been reduced in value by the defendants and the Statutes of Arizona have denied a remedy to the plaintiffs, this property or property right must be susceptible of definition or description. We gather from the plaintiffs' brief that they consider that the good will of their business has been impaired or taken away from them, and that this really is the right they have lost. We deny that they possess any such absolute good will as against the defendants that it may be called property.

Good will, which is property, is something which ordinarily arises out of contract, and wherever it is said to be infringed, and no contract relations have been shown to exist, such statement is made, as we shall find, because some law has been violated, upon the existence and observance of which the complaining party had a right to rely or some nuisance of a public character exists from which the plaintiff has suffered special damages.

When a man sells his business with its "good will," so-called, covenanting that he will not re-establish himself in like business in a given neighborhood or within a certain length of time, he creates a contract relation and may not violate his contract without exposing himself to proceedings in equity. The essence of the situation is not then the intangible thing called "good will" after all, but is a very tangible contract by which the rights of the parties are to be measured.

Divorced from the element of contract, however, good will lacks real substance. If a man buy a store with its good will, another may establish a like store next door, and, no contract relation existing, speedily destroy the ephemeral thing called good will. A court of equity may not be resorted to ordinarily because there is no contract relation between the parties. If the second comer resorts to unfair business methods and false statements about his neighbor, then resort may be had to a

court of equity, even though his neighbor's business is just being established and has had no chance whatever to acquire a good will. It is evident, therefore, that under such circumstances, the thing which the courts protect is not good will in any usual sense of the term, but a man's fair right to obtain a livelihood, irrespective of whether he has pursued that particular occupation theretofore or not.

In the present instance, therefore, there is no contract relation of good will; there is no right to appeal to a court of equity except it be that by some means considered by the law improper under all the circumstances of the case the defendants have injured or destroyed plaintiffs' opportunity to gain a livelihood. This they have not done by the violation of any law, by the creation of any nuisance or in any manner save one—communication to the public by every means within their power of the fact that plaintiffs' establishment is what is called "unfair" to organized labor, and this statement is, as appears from the complaint itself, an entirely truthful one, and the defendants had, as will fully appear, an interest in making the fact known to the public. This interest was twofold in nature. They desired to convince the plaintiffs that it was more to their interest to comply with the terms of employment sought by the union—that such terms of employment, when made known to the public, would appeal to more people—than the pursuit of a contrary course; and, further, the defendants believed that the more widely plaintiffs' unfairness was known, the more general would be the patronage of those establishments where union men were employed, and therefore they would be incidentally benefited. Hence the work of the union did not constitute a gratuitous attempt to interfere with the plaintiffs' business.

We recognize fully the fact that by the weight of authority, even though these objects of which we speak are

generally recognized as sufficient to justify such action on the part of unions, yet, if coupled with wantonness or disorder, or creating a public nuisance, which especially affects the employer, he may appeal to a court of equity.

What we have so far said, however, is for the purpose of showing that there is no such thing, aside from contract rights, as an absolute good will entitling to relief and protection at the hands of a court of equity.

We may add at this point that assuredly in the absence of wantonness, which can not be charged here, and in the absence of libel, which is not charged, the defendants have an absolute right of free speech, and this right of freedom of speech extends, likewise, to freedom of publication. Rights in this respect are more sacred than are rights to conduct business; their destruction would paralyze all hope of improvement in society.

The Clayton Act.

The court will have noticed the strong resemblance between the language used in the provision of the Arizona Code under consideration and that contained particularly in section 20 of the Clayton Act approved October 15, 1914. The material sections of the Clayton Act are 6 and 20, reading as follows:

> "Sec. 6. That the labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.

"Sec. 20. That no restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.

"And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States."

These paragraphs of the Clayton Act have been before courts of the United States for consideration on many

occasions, and never has it been suggested by any court that the Clayton Act was unconstitutional or deprived anyone of property or a property right. We will refer to the Federal authorities bearing upon this point, and also upon the general proposition with regard to picketing, although for reasons we have stated, we do not look upon picketing, so called, *per se*, as an important element even in this case.

In the case of Alaska Steamship Co. *vs.* International Longshoremen's Association, 236 Fed., 964, Judge Neterer of the District Court, Western District of Washington, undertook to limit the actions of a picket to "interviews, peaceable persuasion and inducements," without any suggestion that when so limited such acts could be unlawful. He gave full consideration to the Clayton Act as existing and constitutional, and while his conclusion was adverse to the labor organization involved because of certain acts of violence which were recited, and a failure to suppress them on the part of the union, he, nevertheless, denied that it was "the purpose of this court to abridge any of the rights given by section 20 of the Anti-trust Act"—(the Clayton Act).

In the case of Tri-City Central Trades Council *vs.* American Steel Foundries, 238 Fed., p. 728, the trial court had enjoined the defendants from doing any acts or things whatever in furtherance of any conspiracy or combination among them, to obstruct or interfere with the plaintiff in the control and operation of its plant, and also from ordering, etc., or in any manner abetting any person committing any or either of such acts. And the court said:

> "The obvious effect and purpose of this decree was, among other things, to prevent all picketing by the defendants or others similarly interested, and to prevent these parties from persuading their fellow employees to join them in their effort to

secure what the strikers apparently considered the laborers' just demands. In Iron Molders' Union 125, of Milwaukee *vs.* Allis-Chalmers Co., 166 Fed., 45, 91 C. C. A., 631, 20 L. R. A. (N. S.), 315, the rule is so well stated that we quote from it the following:

"'The right to persuade new men to quit or decline employment is of little worth unless the strikers may ascertain who are the men that their late employer has persuaded or is attempting to persuade to accept employment. Under the name of persuasion, duress may be used; but it is duress, not persuasion, that should be restrained and punished. In the guise of picketing, strikers may obstruct and annoy the new men, and by insult and menacing attitude intimidate them as effectually as by physical assault. But from the evidence it can always be determined whether the efforts of the pickets are limited to getting into communication with the new men for the purpose of presenting arguments and appeals to their free judgments. *Prohibitions of persuasion and picketing, as such, should not be included in the decree.*'"

In further discussion touching the question of picketing the court said:

"In the pursuit of a lawful purpose, to secure a raise in wages, picketing may be employed, as this court has held, to ascertain whom the late employer 'has persuaded or attempted to persuade to accept employment,' and persuasion may be used to induce them to refuse or quit the employment. As stated further in the Allis-Chalmers case:

"'The right of the one to persuade (but not coerce) the unemployed to accept certain terms is limited and conditioned by the right of the other to dissuade (but not restrain) them from accepting. . . . Molders, having struck, in order to make their strike effective, may persuade (but not coerce) other molders not to work for less wages or under worse conditions than those for which

> they struck, and not to work for their late employer at all, so that he may be forced to take them back into his foundry at their own terms.' "

As of incidental value in determining the meaning of the word "employees" in connection with the act under consideration we quote from the same case:

> "Plaintiff's further contention that the defendants were not its employees at the time of the strike, and therefore had no right to picket or persuade by argument those about to enter plaintiff's employment, is not well taken. It is true a striker is not technically an employee. The relation of employer and employee is temporarily suspended during a strike. The situation has been described as:
>
> " 'A relationship between employer and employee that is neither that of a general employer and employee,' nor that of employer and employee 'seeking work from them as strangers.'
>
> "Neither strike nor lockout fully terminates during the strike the relationship between the parties. Among the defendants in this case there were some former employees. Many of the plaintiff's employees at the time of the strike were members of the defendants' organization, the Tri-City Central Trades Council. These facts disprove the charge that the defendants were merely intermeddling in the affairs of a company in which they had no interest. Under these circumstances, it can not be said that the labor organization was an intermeddler or that its course was contrary to the wishes of its members or the wishes of the plaintiff's employees.
>
> "In so far as the decree restrains all picketing and all persuasion and all interference with the plaintiff's free and unrestrained control of its plant and the operation of its business, it transcends the limit of proper restraint, and should be modified, so as to eliminate therefrom any restraining of defendants from doing lawful acts as indicated herein. The order of this court for the

modification of the decree in the Allis-Chalmers' case will afford sufficient and proper guidance for the modification of the decree herein."

While the case was decided adversely to the general contentions of the union, it is worthy of note under the point we are now specially considering, that the court in Stephens *vs.* Ohio State Telephone Co., 240 Fed., p. 759 (District Court, Northern District of Ohio) said:

> "The statute but enacts the position which courts have universally taken; there is nothing new in it, for we hold that no case exists where a court has attempted jurisdiction to control lawful and peaceable action by injunction, although it may seem that sometimes judgment may have been faulty as to what particular action was 'unlawful' or provocative of a disturbed peace.' . . . If it's (Local 245 of the International Brotherhood of Electrical Workers) members will confine their strike activities within the limits of the Clayton Act, then whatever embarrassment ensues to the company will be no illegal interference."

In the case of Puget Sound Traction Light and Power Company against Whitley 243 Fed., 945, it said:

> "There is no statement in the complaint or any of the supporting affidavits charging any one of the defendants with any act of destruction of complainant's property. . . . Nor is there any allegation that the picketing that is carried on is not peaceable and in accordance with the provisions of the Clayton Act (Act, October 15, 1914, Chapter 323, 38 Stat., 730). There is the allegation that 'picketing will not be done peaceably' but no act is charged as the basis for the conclusion for future conduct. . . .
>
> "If the defendants were engaged in peaceable picketing, that is recognized by the Clayton Act, which must control the act of this court."

In Kroger Grocery and Baking Company *vs.* Retail Clerks' International Protective Association, 250 Fed., p. 890, the court said:

> "By that act (the Clayton Act) Congress has seen proper to limit the powers of courts of the United States, sitting as courts of equity, to grant injunctions in disputes between employers and employees, except in certain cases." . . .
>
> "It is a mistake to suppose that by these provisions of the act, any act or acts which were unlawful at the time the act was passed were legalized; the only effect of this act is to prevent United States courts, sitting as courts of equity, from granting injunctions in the cases mentioned therein; but so far as the legality of the acts is concerned, if they were illegal at that time, they are illegal today, and if the plaintiff has been damaged thereby, he may obtain from the courts any remedy which could have been obtained before that time, except an injunction."

Evidently, the court did not believe, as in effect is contended for by the plaintiff's brief, that the plaintiff had a property right in the peculiar processes of a court of equity.

Discussing the subject of picketing the court said:

> "So far as the distribution of the circulars is concerned, they had a perfect right to distribute them if it was done peaceably. They had a perfect right to say to persons who were in the habit of trading in the stores that 'I wish you would not trade there; we have been clerks employed there, and have not been treated fairly, we have not been receiving wages that will allow us to live properly when the cost of living is so high; if you people will stand by us, and refuse to trade with these people until they grant us the relief to which we think we are justly entitled,' they may do so. That would not have been illegal so as to justify an injunction under the Clayton Act."

In Duplex Printing Press Company *vs.* Deering, 247 Fed., 192, peaceful picketing was held legal, and the provisions of the Clayton Act held "in force and are constitutional." This case was affirmed in 252 Fed., 722, by a majority of the court.

The provisions of the Clayton Act have not been directly under discussion in the Supreme Court of the United States, but have received incidental reference in the case of Hitchman Coal and Coke Company *vs.* John Mitchell, 245 U. S., 249, 62 Law. Ed., 260 (decided under a state of facts created before the passage of the Clayton Act) and Paine Lumber Company *vs.* Neal, 244 U. S., 459, 61 Law. Ed., 1256. In neither of these cases was there any suggestion on the part of either the majority or minority of the court that the labor provisions of the Clayton Act were unsatisfactory. In the latter case the minority opinion by Mr. Justice Pitney expresses no view that the Clayton Act can be called into question, while discussing at length the inapplicability of the act to the particular state of facts under discussion.

Picketing.

We have pointed out that what had really been done by the defendants as charged in the bill of complaint, was simply to communicate by print or word of mouth to possible customers of the plaintiffs, the fact that plaintiffs' restaurant was, in the opinion of the defendants, unfair to organized labor, that, therefore, in essence, what the plaintiffs were seeking to do was to suppress for their benefit, freedom of speech and of the press, rights as dear to the defendants as any supposed right of property could be to the plaintiffs.

As the exercise of freedom of speech and of the press took a form which has sometimes been denominated as picketing, we find it necessary (though from our point of view, simply as illustrative) to review many of the deci-

sions of the courts and authorities which may be grouped under the head of "picketing." Before doing so, however, let us advert briefly to the argument of the plaintiffs. Their brief seeks to confuse such "picketing" as has been indulged in by the defendants (peaceful and orderly communication of desires by word of mouth or printed characters) with the general subject of boycotting, with which it has but an incidental relation, and even in this respect the brief, unconsciously, doubtless for the most part begs the real question in the case, the character, lawful or unlawful, of the defendants' action. For instance, the brief declares (pp. 19 and 20) that a large number of authorities vindicate a man's right to carry on his business as a property right "free from *unlawful* interference" without defining the adjective. To this point, on page 20, is quoted Watson *vs.* Sutherland, 5 Wallace, 74, 18 Law. Ed. 580, showing that injunction is available to protect the right to carry on business "free from *unlawful* interference;" on page 22, Crump *vs.* Commonwealth, 84 Va., 927, 6 S. E., 620, as justifying injunction when it is sought to injure another by preventing any and all persons from doing business with him "through fear of incurring the displeasure, persecution and vengeance of the conspirators; on page 23 the case of Brace Brothers *vs.* Evans, 5 Pa. Co. Ct., 163, is quoted on the subject of "boycotting" as having reference to persuasion, intimidation and other acts which tend to violence, and on the same page, Toledo, Ann Arbor and North Michigan Railway Company *vs.* Pennsylvania Company, 54 Fed., 730, is quoted to sustain a definition of "boycotting," including coercion and threats, neither of which apply in this case. On page 24 the case of Hopkins *vs.* Oxley Stave Company, 83 Fed., 912, is likewise quoted with reference to "boycotts" "by means of threats and intimidation." On page 25, Gompers *vs.* Buck's Stove and Range Company, 221 U. S., 418, is quoted with reference

to the power of organized labor "when *unlawfully* used against one," and certain acts are referred to "whereby property is *unlawfully* damaged." On page 27, the case of Atchison, Topeka and Santa Fe Railway Company *vs.* Gee, 139 Fed., 582, is cited to show that in that instance violence was threatened by gesticulations, menaces and harsh names to the persons addressed, and none of which exist in this case. Some of the language of Allis-Chalmers Company *vs.* Iron Molders' Union, 150 Fed., 155, a case which is opposed to the plaintiffs' position, as modified and corrected in 166 Fed., 45, is quoted to define what would be *unlawful* intimidation, again not existing in this case. And, similarly, Kolley *vs.* Robinson, 187 Fed., 415, is cited to the same point.

It is perfectly evident from the foregoing that the unlawful means referred to in nearly all of the plaintiffs' citations are threats of personal damage leveled at the person addressed, violence, coercion and intimidation, none of which elements is to be found set out in the bill of complaint.

While plaintiffs' cases are leveled especially at what is called a boycott, a quite different subject-matter, let us review some of the authorities touching picketing cases.

In Martin's Law of Labor Unions, Section 72, it is said with abundance of citation that:

> "In a preceding chapter it has been shown that in aid of a lawful strike, it is lawful to use peaceable persuasion and argument to induce other workmen in the employ of the person against whom the strike has been declared, and not bound by contract for a definite term to quit his service, or to induce other workmen not in his employ not to enter his service. There is practically no dissent from this doctrine, and by parity of reasoning, it is not unlawful for members of a union, or their sympathizers, to use in aid of a justifiable strike, peaceable argument and persuasion to induce customers of the person against whom the strike is in operation to withhold their patronage

from him although their purpose in so doing is to injure the business of their former employer and constrain him to yield to their demands, and the same rule applies where the employer has locked out his employees. These acts may be consummated by direct communication or through the medium of the press, and it is only when the combination becomes a conspiracy to injure by threats and coercion the property rights of another, that the power of the courts can be invoked. *The vital distinction between combinations of this character and boycotts, is that here no coercion is present, while as was heretofore shown, coercion is a necessary element of a boycott.*" (Italics author's.)

. . . . . .

"So it has been held that the circulation by members of a labor union, acting in concert, of circulars stating certain facts and requesting every member and all other justly thinking persons not to buy goods from a person therein designated, and the putting up of posters having on them the words, 'Scab Labor! Don't Patronize!' (the complaining witness) is not a criminal conspiracy within a statute making it a misdemeanor for two or more persons to conspire to prevent another from exercising a lawful trade or calling or doing any other lawful act, by force, threats, intimidation, or by interfering or threatening to interfere with tools, implements or property used by such person. Labor organizations, it was said, have a right to appeal to the community and request that they withhold patronage from one who does not give fair compensation for labor."

State Cases As to Picketing.

Let us now refer to some of the many cases in which peaceful picketing such as has been indulged in by the defendants is declared entirely lawful.

The fundamental principles involved are most thoroughly discussed in the case of Commonwealth *vs.* Hunt, 38 Am. Dec., 346, 4 Metcalf, 111.

An interesting illustration in this case of Chief Justice Shaw's point of view, is afforded by the following extract:

> "Suppose a baker in a small village had the exclusive custom of his neighborhood, and was making large profits by the sale of his bread; supposing a number of those neighbors, believing the price of his bread too high, should propose to him to reduce his prices, or if he did not, that they would introduce another baker; and on his refusal, such other baker should, under their encouragement, set up a rival establishment, and sell his bread at lower prices; the effect would be to diminish the profit of the former baker, and to the same extent to impoverish him. And it might be said and proved that the purpose of the associates was to diminish his profits, and thus impoverish him, though the ultimate and laudable object of the combination was to reduce the cost of bread to themselves and their neighbors. The same thing may be said of all competition in every branch of trade and industry, and yet it is through that competition that the best interests of trade and industry are promoted. It is scarcely necessary to allude to the familiar instances of opposition lines of conveyance, rival hotels, and the thousand other instances, where each strives to gain custom to himself, by ingenious improvements, by increased industry, and by all the means by which he may lessen the price of commodities, and thereby diminish the profits of others.
>
> "We think, therefore, that associations may be entered into, the object of which is to adopt measures that may have a tendency to impoverish another, that is, to diminish his gains and profits, and yet so far from being criminal or unlawful, the object may be highly meritorious and public-spirited."

The highest court of Massachusetts has held that right to employment, which is strictly analogous with

right to sell to a community, is a personal right and does not involve property. See Worthington *vs.* Waring, 157 Mass., 421, 32 N. E., 744.

In the case of Macauley *vs.* Tierney, 19 R. I., 255, 33 Atlantic, 1, injunction was forbidden where a master plumbers' association affiliated with a national body agreed not to purchase supplies from any wholesalers who sold to plumbers not members of the association, and notified certain wholesalers, as well as members of the association, to that effect.

The case of Johnston Harvester Company *vs.* Meinhardt, 60 Howard Practice, 168, affirmed 24 Hun, 489, is interesting as showing that when common law rules relative to the issuance of injunctions are done away with, no property right is necessarily affected. The defendants were charged with inducing employees to leave plaintiffs by persuasion, personal appeals, the giving of traveling expenses, etc., and it was held that the laws of 1870, Chapter 19, having altered the common law rule, there was no ground for injunction.

The case of Foster *vs.* Retail Clerks' Association, 78 N. Y. Supplement, 860, 39 Misc., 48, is very much in point. Retail clerks of Syracuse had struck against the plaintiffs for a reduction of hours of labor; they distributed circulars declaring plaintiff had been declared unfair, and endeavored to persuade customers and union men to stay away from the store and maintained pickets. No injunction issued.

National Protective Association *vs.* Cummings, 170 N. Y., 315, 63 N. E., 369, is useful as declaring the right of men to refuse to work for any reason, and that it is not illegal to threaten to do what one has a legal right to do; that the motive of helping members of the union to gain employment and of protecting them against the negligence of fellow employees, was a good one.

Mills *vs.* U. S. Printing Company, 99 App. Div., 605,

91 N. Y. Supp., 185, shows that a boycott is not necessarily illegal; that one has a right to refuse to deal with another and that a combination may do what one can so long as there is no unlawful object in view; that two or more may, by persuasion and entreaty, bring others to their side. Although the effect of the combination is to injure another, when the result sought is to protect the members of a combination or to enhance their welfare, the loss is but an incident of the act, the means whereby the ultimate end is gained.

In Butterick Publishing Company *vs.* Typographical Union No. 6, 100 N. Y. S., 292, 50 Misc., 1, a strike occurring, the defendants were allowed to send circulars throughout the United States requesting customers not to purchase plaintiff's publications, or those printed by plaintiff for customers.

In Bohn Manufacturing Company *vs.* Hollis, 54 Minn., 223, 55 N. W., 1119, an injunction against a trade boycott indulged in by the Northwestern Lumbermen's Association was refused, the court holding that any man could refuse to deal with any class of men as he saw fit unless under contract obligation and that combination did not make such act illegal.

In the case of Marx and Haas Clothing Company *vs.* Watson, 168 Mo., 133, 67 S. W., 391, injunction was sought to restrain the defendants, garment workers of St. Louis on strike against the plaintiffs, manufacturers, from visiting customers and endeavoring to persuade them to cease dealing with plaintiffs, in some cases threatening them with loss of business unless they acceded to demands, but in no case threatening physical violence. It was held that injunction would not issue where there was no intimidation through fear of personal violence or of destruction of property, but only the mere abstaining from business relations and the persuading of others to do likewise. That issuance of injunctions would

mean the denial of the right of free speech granted by the Constitution, and would prevent workmen from telling the story of their supposed wrongs. The impecunious character of the defendants constituted no argument for an injunction.

The right to peacefully picket is recognized in Berry Foundry Company *vs.* International Molders' Union, 177 Mo. App., 84, 164 S. W., 245.

A later Missouri case is that of ex parte Heffern 163 S. W., 652 (St. Louis Court of Appeals), in which it was held that injunction would not issue restraining defendants, singly or in numbers, from stationing themselves or congregating upon sidewalks adjoining or in front of plaintiff's business for the purpose of distributing cards or circulars concerning plaintiff or its business, or of addressing remarks concerning plaintiff, or its business, to persons along the sidewalk; that the court was without power to restrain parties from thus using the sidewalk unless they did so with a view of interfering with plaintiff's business, its employees or patrons, through threats, violence or intimidation, or by persuading persons desiring to patronize it, or cause them to desist therefrom against their will, except to restrain the free ingress and egress about plaintiff's premises. Such would be a private nuisance through continued trespass.

The same court in Root *vs.* Anderson, 207 S. W., 255, quite recently held, following the case last cited, and the case of St. Louis *vs.* Gloner, 210 Mo., 502, 124 Am. St. Rep., 750, that picketing in the sense in which that word is used under such circumstances, for the purpose alone of peaceful persuasion, argument or entreaty, is not unlawful or actionable. The case was one of boycott of a theater, the declaration reciting circulation of false circulars, picketing, statements to persons about to attend that plaintiff employed scab labor, etc.

In the case of Steffes *vs.* Motion Picture, etc., Union,

136 Minn., 206, the court allowed the display of banners describing plaintiff's place as unfair to organized labor, and relied on Gray *vs.* Building Trades Council, 91 Minn., 171, 63 L. R. A., 753, 103 Am. St. Rep., 477, as showing that mere notification of unfairness was not a threat or unlawful, further citing Foster *vs.* Retail Clerks, etc., and Butterick *vs.* Typographical Union above cited. The case of Rorabach *vs.* Motion Pictures Union, 168 N. W., 766, was distinguished because there the cause of attack was plaintiff's working for himself. Ordinary picketing to aid the union was recognized as having a lawful purpose.

The case of Richter *vs.* Journeymen Tailors, 24 Weekly Law Bulletin, 189 (Ohio), was one for injunction in which it was sought to enjoin libelous circulars. The defendant had placed on walls, buildings and bulletin boards in the vicinity of plaintiff's business, posters stating that the public should shun scab shops, and sent letters to the public alleged to contain libelous statements. A court of equity was held without jurisdiction to intervene.

In the case of Riggs *vs.* Waiters' Alliance Local, 5 Ohio N. P., 386, injunction was sought to restrain distribution of so-called libelous circulars. Waiters on strike displayed placards and distributed circulars in front of and in the vicinity of plaintiff's premises which stated that plaintiff was on the unfair list, and requested customers not to patronize it. The circulars were alleged to be libelous. It was held, however, that such acts could not be enjoined on the ground that they were a nuisance as the public highway was not obstructed, and that equity will not interfere by injunction to restrain publication or circularization of a libel. "Where the gist of the injury is purely personal as, for instance, in cases of a libel, the fact that it may be injurious to property does not give a court jurisdiction." To restrain such libel would be to interfer with freedom of speech and liberty of the press; abuse of this right may only be punished

criminally or subject the offender to civil suit for damages.

In the case of State *vs.* Van Pelt, 136 N. C., 633, 49 S. E., 177, carpenters and joiners had notified the employer that he would not be considered in sympathy with organized labor unless he employed only union men and discharged his nonunion men, some of whom were under contract relations with him, and on his refusal to accede to their demands, published a resolution in a newspaper that he employer was unfair, and that henceforth union men would refuse to work on material from his shop. The court held that defendants had a right to publish a statement setting forth that they had done, or intended to do, acts which they had a legal right to do.

In the case of J. P. Parkinson Co. *vs.* Building Trades Council, 154 Calif., 581, 98 Pacific, 1027, injunction was asked for because of a boycott involving patronage. The defendants had struck against the proprietor of a lumber, plumbing and tinning shop because of his employment of a nonunion man, and sent circulars to plaintiff's customers stating that his shop was unfair, and that union men would not work for any contractors purchasing supplies from him. A number of customers ceased dealings, some cancelling unfilled orders. It was held that no injunction should be granted; that the purpose of the strike to secure the employment only of union men was lawful, as was the ruling of the council that no union men should handle non-union goods; that fair dealing required that contractors be informed of the status of the plaintiff, and that, therefore, the sending of notice was justifiable. Judge Sloss declared that the defendants had the right to cease to deal with one pursuing a course detrimental to them and with one aiding by their patronage, the offenders' detrimental policies; that defendants had a legal right to refuse to enter into business relations

with others, and that threats to exercise their legal right would not be considered unlawful.

In Pierce *vs.* Stablemen's Union, 156 Calif., 70, 103 Pac., 324, where the defendants had instituted a boycott, establishing a picket and using menacing language, the appellate court held that the strikers had the right by all legitimate means—by fair publication and fair oral or written persuasion—to induce others interested in or sympathetic with their cause, to withdraw their social intercourse and business patronage from the employer.

In the case of Lindsay *vs.* Montana Federation of Labor, 37 Mont., 264, 96 Pac., 127, injunction was granted by the lower court against circulars calling upon all laboring men and those in sympathy with organized labor not to patronize the plaintiff, the demand being made, as was stated, for the protection of those appealed to, and "for the protection of organized labor." The Supreme Court, however, held that as it was not unlawful for an individual to withdraw his patronage from the plaintiff, or from any other concern which might be doing business with him for any reason, it was not for a combination; that the defendants could not be enjoined from boycotting unless they used unlawful means; that the only means here used was the publication of a circular, and that a court of equity might not enjoin its publication. If libelous it could only be reached by civil or criminal process.

In the later case of Theater Company *vs.* Cloke, 53 Mont., 183, the defendants used banners, declared boycott, published orally that the theater was unfair, and said so to persons in front of it and about to enter, and the court said that he could so publicly publish and announce "without committing a nuisance, stop every person in the city and communicate their message, so long as they did not take their stand in the immediate vicinity of the theater, and there demean themselves so as to

create an obstruction to the plaintiff's free use of the property or of an obstruction of the streets as a means of access thereto."

In the case of Union Labor Hospital Association *vs.* Vance Redwood Lumber Company, 158 Calif., 551, 112 Pac., 886, the defendants, employers of labor, gave their employees tickets which would admit them to four hospitals of the city, excluding plaintiffs, but it was held that no malicious intent to injure the plaintiff's business was shown and even if malice existed, defendants exercised a legal right, and motive under these conditions was immaterial; that the intimidation was purely moral and not illegal and no element of monopoly entered into it.

In Karges Furniture Company *vs.* Amalgamated Woodworkers' Local, 165 Ind., 421, 2 L. R. A. (N. S.), 788, it was held that peaceful picketing designed to persuade employees to join strikers was not unlawful.

In Jones *vs.* Van Winkle Gin and Machinery Works, 131 Ga., 336, 17 L. R. A. (N. S.), 848, the court said:

> "As we have pointed out, it was not unlawful for the strikers to use legitimate argument and moral suasion in presenting their case to those who offered to take their places so long as it is neither coercive nor intimidating in character. In affirming the judgment direction is given to so amend the decree as to make it accord with the opinion of the court in this particular."

In Hoster Brewing Co. *vs.* Giblin, 14 Ohio Dec., 305, it was held that striking employees have a right to maintain a patrol of pickets of such persons as they may detail from their number for the purpose of observing who go to and from the place of employment to enable them to exercise the right which they have of trying to persuade other men from taking their places.

Like expressions were given in Jones *vs.* Maher, 116 N. Y. Supp., 180, affirmed without opinion in 141 App.

Div., 919, 125 N. Y. S., 1126, and in Fletcher Company *vs.* International Association of Machinists, 55 Atlantic, 1027; Levy *vs.* Rosenstein, 100 N. Y. S., 101; Kerbs *vs.* Rosenstein, 56 App. Div., 619; 67 N. Y. S., 385; Standard Tube and Forkside Company *vs.* International Union, 7 Ohio N. P., 87; Perkins *vs.* Rogg, 11 Ohio Dec. Reprint, 585; Everett-Waddey Company *vs.* Richmond Typographical Union, 53 S. E., 273.

Federal Cases Touching General Subject of Argument.

In other connections we have referred to federal cases touching this general subject, and we shall now add a few additional authorities.

It seems to us that the case of Francis *vs.* Flinn, 118 U. S., 385, 30 Law. Ed., 165, is exactly in point. There a suit was brought in equity to restrain the defendants from doing things charged against them intended to injure the plaintiff and destroy his property and business. It was said that the defendants had combined for the purpose of plaintiff's destruction by publication in the newspapers and by various suits, and by injunctions, etc., but the court said that:

> "The whole gist of the complaint is that the defendants do not treat the plaintiff as having a right to use his vessel as a pilot boat, and have publicly so stated, and that some of the parties mentioned have been subjected to suits for their acts in piloting. But if this be so, the plaintiff has a full remedy for his alleged wrongs in the courts of law. They furnish no ground for the interposition of a court of equity. If the plaintiff has a right to pilot vessels with his boat through the pass and is wrongfully interfered with by the defendants or others, he can prosecute them for the wrong. If his vessel is arrested in its passage, without lawful warrant, he can bring the defendants before the courts to answer for their conduct. If his pilots are duly licensed, and they are hindered or prevented from the exercise of their business, both he and they have the same

means of redress which are afforded to every citizen whose rights are invaded and obstructed. If the publications in the newspapers are false and injurious, he can prosecute the publishers for libel. If a court of equity could interfere and use its remedy of injunction in such cases, it would draw to itself the greater part of the litigation properly belonging to courts of law."

We do not cite or comment upon the case of Loewe *vs.* Lawlor, 208 U. S., 274, 52 Law. Ed., 274, as the questions decided in that case relate exclusively to boycotting, and because of the later adoption of the Clayton Act.

We may refer to the Paine Lumber Company *vs.* Neale, 244 U. S., 459, 61 Law. Ed., 1256. In this case there was concerted action to prevent the use of non-union-made material manufactured in other States, and an injunction was refused as not permissible under the Sherman Act because sought at the instance of a private party. In the opinion of the majority, however, it is said that "as this court is not the final authority concerning the laws of New York, we say but a word about them. We shall not believe that the ordinary action of a labor union can be made the ground of an injunction under those laws until we are so instructed by the New York Court of Appeals. National Protective Association *vs.* Cummings, 170 N. Y., 315, 58 L. R. A., 135, 88 Am. St. Rep., 648, 63 N. E., 369."

The opinion of Mr. Justice Pitney in dissent, referring to the Clayton Act, says that section 6 safeguards these (labor) "organizations while pursuing their *legitimate* objects by *lawful* means, and prevents them from being considered, merely because organized, to be illegal combinations or conspiracies in restraint of trade."

In Sona *vs.* Aluminum Castings Company, 214 Fed., 936, it is said that "picketing when accompanied by vio-

lence, or any manner of coercion or intimidation, to prevent others from entering or remaining in the service of their employer, is unlawful," indicating clearly that picketing without violence, coercion or intimidation remains lawful, and, therefore within the language alike of the Arizona Statute and of the Clayton Act.

In Gill Engraving Company *vs.* Doerr, 214 Fed., 111 (a strike and boycott case), the judge found that "the great and all-absorbing object of defendant's endeavors was and is to get all the work in the trade or, at any rate, all the work worth having, for their own members," and an injunction was refused.

In Stoner *vs.* Roberts, 43 Washington Law Rep., 437, Justice McCoy of the Supreme Court of the District of Columbia, held, as correctly stated in the syllabus, that "the stationing by a labor union whose members are on strike because of differences with certain breweries regarding the terms of employment of pickets in front of the premises of a saloon keeper to inform patrons of said saloon keeper that he sold non-union beer, is not unlawful and will not be enjoined, where the proof shows that such picketing is entirely peaceful and has in it no element of intimidation of would-be patrons."

Summary as to Cases Touching Picketing and Affecting the Constitutionality of the Arizona Statute.

Certain things are made perfectly clear from a consideration of the foregoing cases; one is that in no single instance, according to the Reports, has any court, State or Federal, declared such acts as the Arizona Act under consideration and the Clayton Act, to be in the slightest degree unconstitutional; nor has any court in any reported case furnished the slightest justification for a declaration of unconstitutionality. On the other hand, time and again the courts have recognized the perfect

right of the legislative authority to do away with proceedings by injunction, leaving to the law court determination of the question of the infliction of real and unlawful damage.

It is, of course, true, as we have stated, that in certain instances injunctions have been granted and sustained where resort has been had, or is threatened, to coercion, intimidation and unlawful threats and violence, including violation of State statutes and municipal ordinances designed for the vindication of order. Where attempts have been made to bring about the breaking of contracts, injunction has also, in many cases, been permitted, but with this branch of the subject we are not called upon to deal.

The naked proposition enunciated by plaintiffs is that in the case of a peaceful strike, with relation to which members of labor organizations have informed the public by spoken or printed words, the plaintiff has a property right in having their mouths shut and their pens stopped. No court has ever enunciated such a doctrine save two or three which have held as a matter of law that there is no such thing as peaceful picketing. In view of the citations we may say without need of further argument on the subject, that there is no principle of law declaring picketing to be necessarily disorderly and no property right in the plaintiffs in the maintenance of any such absurd proposition.

Equal Protection of the Laws.

In alleging that the Arizona statute here under review violates that provision of the Fourteenth Amendment to the United States Constitution providing for equal protection of the laws, appellants allege a discrimination which the words of the statute surely do not justify. That law does not hold in favor of any particular class,

or against any other particular class, but instead makes a provision as to "any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment." A broader classification could hardly be conceived, as nearly the entire human race can be grouped under the words "employers or employees." The only possible exception would be the extremely small number of professional or business men who have no clerk or assistant or servant whatsoever, and who, at the same time, do not sustain the relation of employee to any other individual; and in addition a few of those who do no work and have no business, hence may be considered the drones of society. It is not apparent how either of these small groups is discriminated against by not having the benefit of Paragraph 1464 of the Civil Code, Revised Statutes of Arizona, 1913.

It is indisputable that the lawmaking body has the power to create certain classifications in enacting legislation, and were this not so the subjects upon which the legislature could enact statutes would be very limited indeed.

The cases selected by plaintiffs in error in support of their contention on this point do not sustain their argument. That from the California Reports (Goldberg, Bowen & Co. *vs.* Stablemen's Union, 149 Cal., 429), shows upon its face that the words relied upon are mere *obiter dicta*: for the court first holds that the statute could not be construed as undertaking to prohibit it from enjoining the wrongful acts charged in the complaint, and then remarks (unnecessarily) that "*if it could be so construed* it would to that extent be void."

As to the opinion of Justices of the Supreme Judicial Court of Massachusetts (211 Mass., 618), that can have no application here because the proposed statute there considered was one in favor of "a trade union or an

association of employers," and undertook to confer special privileges upon combinations, whether of employers or laborers, and at the same time to deny them to employers who were not members of a combination. It placed a premium upon the fact of employers or laborers combining, and to that extent deprived individuals who either employed or were employed from having the same benefits. It was a clear discrimination in favor of associated employers and of trade unions, and to that extent it was violative of the constitutional guaranty against a denial of the equal protection of the laws.

The words in that statute are so fundamentally different from those of the Arizona statute involved in the instant case that opposing counsel must have been hard pressed for an argument to rely upon that opinion.

As to Bogni *vs.* Perotti (224 Mass., 152), the same involved a Massachusetts statute, a portion of which was somewhat similar to part of the Arizona statute now under discussion; but the remainder of that law was utterly different from this, and, consequently, the ruling of the Massachusetts court is not pertinent here. Thus, under section 2 of that act the right to work or to employ others was held and construed to be "a personal and not a property right," and, consequently, the court held, all of the guarantees built up by the Federal and the State constitution around property rights were attempted to be swept away in so far as was concerned the right to enter into and continue in the relation of employer or employee. The Arizona statute makes no such provision.

Moreover, sections 1 and 3 of the Massachusetts law placed a premium on combinations of laborers and that resulted in the acts of intimidation which led to the bringing of the action by *Bogni et al.* They were members of an unincorporated association, whereas the defendants were officers of a labor union duly incorporated. The latter had caused the former to be discharged from

their employment and had prevented them from getting other employment by intimidating their employers or prospective employers, and thus had deprived them of their right of securing work—and the Massachusetts law assisted them by declaring that such right was not a property right but a mere personal one.

It will thus be noted that the Massachusetts statute, declared unconstitutional in Bogni *vs.* Perotti, was considered one passed in the interest and for the benefit of combinations of labor, thus discriminating against individual laborers and against all employers, and for that reason it was possibly more objectionable than the proposed law considered in the opinion of justices (*supra*). But both of those Massachusetts provisions were wholly different from the Arizona law here under consideration, as this law provides equally for employers and employees and gives no advantage to combinations of either, as against uncombined and unassociated workmen and employers.

While plaintiffs in error have quoted at length from the language of the Massachusetts court in the case cited, they have failed to mention that portion of it which distinguishes that case from cases like the one at bar. We will, accordingly, quote that here:

> "Doubtless the legislature may make many classifications in laws which regulate conduct and to some extent restrict freedom. So long as these have some rational connection with what may be thought to be the public health, safety or morals, or in a more restricted sense, 'so as not to include everything that might be enacted on grounds of mere expediency,' the public welfare, *they offend no constitutional provision.* (Commonwealth *vs.* Strauss, 191 Mass., 545, 550.) . . . Booth *vs.* Indiana, 237 U. S., 391; Tanner *vs.* Little, 240 U. S., 369, where many cases are collected."

The court also characterized as the gist of the whole case "the preference attempted to be conferred upon

combinations of labor by the act," and we submit that is the real basis of the ruling in Bogni *vs.* Perotti.

In addition to the two decisions of this court above cited, we refer to that in Singer Sewing Machine Company *vs.* Brickell (233 U. S., 304) in which it was held that an act of the State of Alabama providing for the taxation of companies selling sewing machines, but making an exception in favor of those selling them from stores rather than from delivery wagons, was not a violation of the provision of either the Federal or the State constitution guaranteeing equal protection of the laws.

Likewise to the recent decision of this court in International Harvester Company *vs.* Missouri (234 U. S., 199), wherein it was ruled that an act of that State prohibiting combinations of companies engaged in the sale of certain commodities was not unconstitutional by reason of its failure to prohibit similar combinations of employees, etc. In that case, and likewise in the Singer Sewing Machine case, this court characterized the right of the State to make classifications as a very broad one and to be interfered with only upon a clear showing that it resulted in denying the equal protection of the laws. These decisions, and particularly the International Harvester one, have digested the cases on the subject so exhaustively that it seems hardly necessary for us to do more than cite them. Certainly the "discrimination" alleged by plaintiffs in error in the present case is no greater, to say the least, than those in the Alabama and Missouri laws, held by this court to be not unconstitutional in the two cases cited.

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Attorneys for Appellees.

TRUAX ET AL., COPARTNERS, DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF WILLIAM TRUAX, *v.* CORRIGAN ET AL.

ERROR TO THE SUPREME COURT OF THE STATE OF ARIZONA.

No. 13. Argued April 29, 30, 1920; restored to docket for reargument June 6, 1921; reargued October 5, 6, 1921.—Decided December 19, 1921.

1. Where the issue is whether a state statute, in its application to facts specifically alleged, and admitted by demurrer, violates the plaintiff's rights under the Constitution, this court must analyze the facts as averred and draw its own inferences as to their ultimate effect; it is not bound by the state court's conclusion in this regard, nor by that court's declaration that the statute is merely a rule of evidence. P. 324.
2. The bill showed in substance that the defendants, for the purpose of winning a strike called by the defendant labor union over terms and conditions of employment in plaintiffs' restaurant, conspired to injure or destroy the business by inducing actual and prospective customers to withhold their patronage, and to that end caused the restaurant to be picketed by men who, throughout business hours, were stationed at the entrance proclaiming in a loud voice its "unfairness" to union labor, and who patrolled the sidewalk before it and, by word of mouth and through banners and handbills, made and circulated abusive and libelous attacks upon the plaintiffs, their business, their employees and customers, with threats of like consequences to future customers; and that much injury to the business resulted. *Held*, that the bill stated a plain case of conspiracy and actionable wrong. P. 327.
3. If, as it seems to have been interpreted by the Supreme Court of Arizona, the law of that State (Rev. Stats., 1913, par. 1464) regulating injunctions in labor controversies, grants the defendants in this case immunity from any civil or criminal action for the wrongs above stated, or leaves them merely subject to criminal prosecution for libel, it violates the Fourteenth Amendment by depriving the plaintiffs of their property without due process of law. P. 328.
4. The legislative power of a State can only be exerted in subordination to the fundamental principles of right and justice which

the guaranty of due process in the Fourteenth Amendment is intended to preserve, and a purely arbitrary or capricious exercise of that power, whereby a wrongful and highly injurious invasion of property rights is practically sanctioned and the owner stripped of all real remedy, is wholly at variance with those principles. P. 329. *New York Central R. R. Co.* v. *White*, 243 U. S. 188, distinguished.

5. The distinction between peaceful secondary boycotts and the present case, considered. P. 330.

6. The relations of the due process and equal protection clauses of the Fourteenth Amendment, considered. P. 331.

7. The equal protection clause was aimed at undue favor and individual or class privilege, on the one hand, and at hostile discrimination or the oppression of inequality on the other; it secures equality of protection not only for all, but against all, similarly situated; it is a pledge of the protection of equal laws. P. 332.

8. Assuming that a state legislature may vary equitable relief in the state courts at its discretion, and even take away their equity jurisdiction altogether, the equality clause forbids that it deny such relief to one man while granting it to another under like circumstances and in the same territorial jurisdiction. P. 334.

9. A state law which specially exempts ex-employees, when committing tortious and irreparable injury to the business of their former employer, from restraint by injunction, while leaving subject to such restraint all other tort-feasors engaged in like wrong-doing, is unreasonable and without any just relation to the acts in respect of which it is proposed. P. 337.

10. Such a classification cannot be upheld as a legalized experiment in sociology; the very purpose of the Constitution was to prevent experimentation with the fundamental rights of the individual. P. 338. *Second Employers' Liability Cases*, 223 U. S. 1; *New York Central R. R. Co.* v. *White*, *supra*, and similar cases, distinguished.

11. In view of the construction placed by the state court upon Ariz. Rev. Stats., 1913, par. 1464, in this case, and because the equal protection clause applies only to state action, the conclusion that the statute is in part unconstitutional does not mean that § 20 of the Clayton Act, an act of Congress similarly worded but very differently construed, is also invalid. P. 340. Cf. *American Steel Foundries* v. *Tri-City Central Trades Council*, *ante*, 184.

12. Paragraph 1456, Ariz. Rev. Stats., 1913, making general provision for issuance of injunctions, is separable from par. 1464, *supra*, having been adopted by the Territory and continued by

the state constitution as a state law before par. 1464 was enacted as an amendment, and the unconstitutionality of the latter does not affect the continued operation of the former. P. 341. *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, distinguished.

20 Ariz. 7, reversed.

ERROR to review a decree of the Supreme Court of Arizona, which affirmed a decree of the Superior Court of Cochise County dismissing upon demurrer the complaint of the present plaintiffs in error in their suit to restrain the defendants from committing the acts described in the opinion.

Mr. Clifton Mathews, with whom *Mr. Everett E. Ellinwood* and *Mr. John Mason Ross* were on the briefs, for plaintiffs in error.

The acts and conduct of defendants constitute a secondary boycott. *Duplex Printing Press Co.* v. *Deering*, 254 U. S. 443, and many other cases.

This very fact of picketing is in itself sufficient to show the coercive character of the means employed. *Atchison, Topeka & Santa Fe Ry. Co.* v. *Gee*, 139 Fed. 582; *Vonnegut Machinery Co.* v. *Toledo Machine Co.*, 263 Fed. 192; *Local Union No. 313* v. *Stathakis*, 135 Ark. 86; *Pierce* v. *Stablemen's Union*, 156 Cal. 70; *Rosenberg* v. *Retail Clerks' Association*, 39 Cal. App. 67; *Barnes & Co.* v. *Chicago Typographical Union*, 232 Ill. 424; *Sherry* v. *Perkins*, 147 Mass. 212; *Beck* v. *Railway Teamsters' Protective Union*, 118 Mich. 497; *Webb* v. *Cooks' &c. Union*, 205 S. W. 465; *St. Germain* v. *Bakery & Confectionery Workers' Union*, 97 Wash. 282.

The word "unfair," when used under the circumstances set forth in the complaint, is, in effect, a notification to the public that the place or person declared "unfair" is being boycotted by organized labor, and that anyone who continues dealing with the boycotted person will thereby incur the enmity of labor organizations generally, and will be likely to suffer some form of retaliation at their

hands. *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418; *Seattle Brewing Co.* v. *Hansen*, 144 Fed. 1011. See also *American Federation of Labor* v. *Buck's Stove & Range Co.*, 33 App. D. C. 83; *Wilson* v. *Hey*, 232 Ill. 389.

The printed handbills are scurrilous and abusive and convey a threat of injury to plaintiffs' customers. The vagueness of the threat only renders it the more effective. *Casey* v. *Cincinnati Typographical Union*, 45 Fed. 135; *Seattle Brewing Co.* v. *Hansen*, 144 Fed. 1011; *Rocky Mountain Bell Telephone Co.* v. *Montana Federation of Labor*, 156 Fed. 809; *My Maryland Lodge* v. *Adt*, 100 Md. 238; *Beck* v. *Railway Teamsters' Union*, 118 Mich. 497.

But for the statute in question, the boycott could have been enjoined. The courts of this country, both state and federal, are practically unanimous in holding that a secondary boycott, as here exemplified, is wrongful and unlawful. [Citing many authorities.]

The writ of injunction has not been abolished in Arizona, but, on the contrary, it has been expressly recognized and provided for by statute. Rev. Stats. Arizona, 1913, par. 1456. The issuance of injunctions under this statute is a matter of daily occurrence. The only requirement is that the applicant must show himself entitled thereto under the principles of equity.

In depriving plaintiffs of the right to enjoin the boycott while leaving the remedy by injunction still available to other litigants, the statute denies plaintiffs the equal protection of the laws, contrary to the Fourteenth Amendment. As construed by the Arizona Supreme Court, it discriminates against plaintiffs, (1) by reason of the class to which they belong, and (2) by reason of the class to which their property belongs.

By these classifications, a remedy freely granted to one person is withheld from another, though they both

stand in the same situation. The right sought to be protected, the wrong sought to be prevented, the remedy sought to be applied, the propriety of the remedy, the urgency of the need, the form of the action, the pleadings, the proofs—all the facts and all the equities—may be the same in the one case as in the other; and yet the remedy which the court grants to the one applicant must be withheld from the other, simply because of the accidental and wholly irrelevant circumstance that this applicant once employed the wrong-doers, and had a disagreement with them concerning the terms and conditions of their employment and that the wrong is being committed because of that disagreement; coupled with the further accidental and irrelevant fact that the property which the applicant seeks to protect is not of a tangible character, but consists merely of his business and of his right to conduct that business in such lawful manner as he sees fit.

Is not this as arbitrary and capricious, as unreasonable and oppressive, as if the statute had said that injunctions should be granted to white men and withheld from colored men, or granted to Protestants and withheld from Catholics, or granted to Democrats and withheld from Republicans? Might it not as well have said that injunctions should issue to protect real estate, but not personal property, or to protect brick houses, but not wooden houses, or to protect houses situated on even-numbered lots, but not those on odd-numbered lots? Can it be said that the distinction upon which the classification is based bears any reasonable or just relation to the thing in respect to which the classification is imposed?

Thanks to the good sense and fair-mindedness of legislatures generally, attempts to deny this right of equal access to the courts have been comparatively few and infrequent. Examples, however, have not been wanting. *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540; *John-*

son v. *Goodyear Mining Co.*, 127 Cal. 4; *Black* v. *Seal*, 6 Houst. 541; *Hecker* v. *Illinois Central R. R. Co.*, 231 Ill. 574; *Green* v. *Red Cross Medical Service Co.*, 232 Ill. 616; *Zolnowski* v. *Illinois Steel Co.*, 233 Ill. 299; *Reinhardt* v. *Chicago Junction Ry. Co.*, 235 Ill. 576; *Funkhouser* v. *Randolph*, 287 Ill. 94; *Cincinnati &c. Ry. Co.* v. *Clark*, 11 Ky. Law Rep. 286; *German Insurance Co.* v. *Miller*, 12 Ky. Law Rep. 138; *Pearson* v. *Portland*, 69 Me. 278; *Opinion of Justices*, 211 Mass. 618; *Bogni* v. *Perotti*, 224 Mass. 152; *In re Flukes*, 157 Mo. 125; *McClung* v. *Pulitzer Publishing Co.*, 279 Mo. 370; *Hargraves Mills* v. *Harden*, 56 N. Y. S. 937; *Rosin* v. *Lidgerwood Mfg. Co.*, 86 N. Y. S. 49; *Wally's Heirs* v. *Kennedy*, 2 Yerg. 554; *Phipps* v. *Wisconsin Central Ry. Co.*, 133 Wis. 153; *Kiley* v. *Chicago &c. Ry. Co.*, 138 Wis. 215; *State* v. *Wisconsin-Minnesota Light Co.*, 165 Wis. 430. Of all these cases, the one which most nearly resembles the case at bar is that of *Bogni* v. *Perotti*.

Mr. Jackson H. Ralston, with whom *Mr. Stanley D. Willis*, *Mr. Wiley E. Jones* and *Mr. Samuel Herrick* were on the briefs, for defendants in error.[1]

The issue presented is, whether peaceable persuasion by circulars, banners and word of mouth is intrinsically unlawful, and by its very existence unlawfully takes away some property or property rights of plaintiffs.

While the question has been largely discussed in picketing cases, yet, analyzing this situation, the picketing is purely incidental—a means adopted to inform the public that plaintiffs' establishment was deemed unfair. This picketing can not be regarded in any other light, because no state or municipal law has been violated, and the ingress and egress of customers has not been interfered with.

[1] At the first hearing the case was argued by *Mr. Ralston* and *Mr. Herrick*, for defendants in error.

We deny that the plaintiffs possess any such absolute good will as against the defendants that it may be called property. Good will, which is property, is something which ordinarily arises out of contract. Wherever it is said to be infringed, and no contract relations have been shown to exist, such statement is made because some law has been violated, upon the observance of which the complaining party had a right to rely; or some public nuisance exists from which the plaintiff has suffered special damages. The thing which the courts protect in such cases is not good will in any usual sense of the term, but a man's fair right to obtain a livelihood.

In the present instance, there is no contract relation of good will; there is no right to appeal to a court of equity except it be that by some means considered by the law improper under all the circumstances the defendants have injured or destroyed plaintiffs' opportunity to gain a livelihood. This they have not done by the violation of any law, by the creation of any nuisance or in any manner save one—communication to the public of the fact that plaintiffs' establishment is "unfair" to organized labor. This statement, as appears from the bill, is an entirely truthful one, and the defendants had an interest in making it known to the public. Hence, the work of the union did not constitute a gratuitous attempt to interfere with the plaintiffs' business.

We admit that, even though these objects are generally recognized as sufficient to justify such action on the part of unions, yet, if coupled with wantonness or disorder, or creating a public nuisance, which especially affects the employer, he may appeal to a court of equity. But in the absence of wantonness or libel, which are not charged here, the defendants have an absolute right of free speech, which extends, likewise, to freedom of publication. Such rights are more sacred than are rights to conduct business.

The provision of the Arizona statute under consideration strongly resembles § 20 of the Clayton Act. Though §§ 6 and 20 of the Clayton Act have been before the federal courts on many occasions, it has never been suggested that that act was unconstitutional or deprived anyone of property or of a property right. See on this point, and also on the general proposition regarding picketing: *Alaska S. S. Co.* v. *International Longshoremen's Association*, 236 Fed. 964; *Tri-City Central Trades Council* v. *American Steel Foundries*, 238 Fed. 728 [s. c., *ante*, 184]; *Stephens* v. *Ohio State Telephone Co.*, 240 Fed. 759; *Puget Sound Traction Co.* v. *Whitley*, 243 Fed. 945; *Kroger Grocery Co.* v. *Retail Clerks' Association*, 250 Fed. 890; *Duplex Printing Press Co.* v. *Deering*, 247 Fed. 192; 252 Fed. 722; *Kinloch Telephone Co.* v. *Local Union No. 2*, 265 Fed. 312. In neither *Hitchman Coal & Coke Co.* v. *Mitchell*, 245 U. S. 229, nor *Paine Lumber Co.* v. *Neal*, 244 U. S. 459, was there any suggestion that the labor provisions of the Clayton Act were invalid.

Peaceful picketing such as has been indulged in by the defendants has many times been declared entirely lawful. [Citing many cases.]

From a consideration of these cases, it is clear that in no single instance has any court, state or federal, declared such legislation as the Arizona statute and the Clayton Act to be unconstitutional. On the contrary, they have recognized the right of the legislature to do away with proceedings by injunction, leaving to the law court determination of the question of the infliction of real and unlawful damage.

The plaintiffs seek to confuse peaceful picketing with the general subject of boycotting, with which it has but an incidental relation. Their argument for the most part begs the real question in the case,—the character, lawful or unlawful, of the defendants' action. The cases

relied on by plaintiffs are inapplicable here. The unlawful means referred to in nearly all of them are threats of personal damage leveled at the person addressed, violence, coercion and intimidation, none of which elements is set out in the bill in this case.

The Arizona statute does not hold in favor of any particular class, or against any other particular class, but makes a provision as to "any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment." A broader classification could hardly be conceived, as nearly the entire human race can be grouped under the words "employers and employees." *Goldberg, Bowen & Co.* v. *Stablemen's Union*, 149 Cal. 429; *Opinion of the Justices*, 211 Mass. 618; and *Bogni* v. *Perotti*, 224 Mass. 152, are distinguishable.

The right of the State to make classifications is a very broad one and is to be interfered with only upon a clear showing that it resulted in denying the equal protection of the laws. *Singer Sewing Machine Co.* v. *Brickell*, 233 U. S. 304; *International Harvester Co.* v. *Missouri*, 234 U. S. 199. Certainly the discrimination alleged in the present case is no greater than that in the laws held by this court to be not unconstitutional in the two last cited cases.

MR. CHIEF JUSTICE TAFT delivered the opinion of the court.

The plaintiffs in error, who were plaintiffs below, and will be so called, own, maintain and operate, on Main Street, in the City of Bisbee, Arizona, a restaurant, known as the "English Kitchen." The defendants are cooks and waiters formerly in the employ of the plaintiffs, together with the labor union and the trades assembly of which

they were members. All parties are residents of the State of Arizona.

The complaint set out the following case:

In April, 1916, a dispute arose between the plaintiffs and the defendants' union concerning the terms and conditions of employment of the members of the union. The plaintiffs refused to yield to the terms of the union, which thereupon ordered a strike of those of its members who were in plaintiffs' employ. To win the strike and to coerce and compel the plaintiffs to comply with the demands of the union, the defendants and others unknown to the plaintiffs entered into a conspiracy and boycott to injure plaintiffs in their restaurant and restaurant business, by inducing plaintiffs' customers and others theretofore well and favorably disposed, to cease to patronize or trade with the plaintiffs. The method of inducing was set out at length and included picketing, displaying banners, advertising the strike, denouncing plaintiffs as "unfair" to the union and appealing to customers to stay away from the "English Kitchen," and the circulation of handbills containing abusive and libelous charges against plaintiffs, their employees and their patrons, and intimations of injury to future patrons. Copies of the handbills were set forth in exhibits made part of the complaint.

In consequence of defendants' acts, many customers were induced to cease from patronizing plaintiffs, and their daily receipts, which had been in excess of the sum of $156 were reduced to $75. The complaint averred that if the acts were continued, the business would be entirely destroyed, and that the plaintiffs would suffer great and irreparable injury; that for the plaintiffs to seek to recover damages would involve a multiplicity of suits; that all the defendants were insolvent, and would be unable to respond in damages for any injury resulting from their acts and the plaintiffs were therefore without any adequate remedy at law.

The complaint further averred that the defendants were relying for immunity on Paragraph 1464 of the Revised Statutes of Arizona, 1913, which is in part as follows:

"No restraining order or injunction shall be granted by any court of this state, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving or growing out of a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property or to a property right of the party making the application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.

"And no such restraining order or injunction shall prohibit any person or persons from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at or near a house or place where any person resides or works, or carries on business, or happens to be for the purpose of peacefully obtaining or communicating information, or of peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute; or from recommending, advising, or persuading others by peaceful means so to do; . . ."

The plaintiffs alleged that this paragraph if it made lawful defendants' acts contravened the Fourteenth Amendment to the Constitution of the United States by depriving plaintiffs of their property without due process of law, and by denying to plaintiffs the equal protection of the laws, and was, therefore, void and of no effect. Upon the case thus stated the plaintiffs asked a temporary, and a permanent, injunction.

The defendants filed a demurrer, on two grounds: First, that the complaint did not state facts sufficient to constitute a cause of action, in that the property rights asserted therein were not, under Paragraph 1464, Revised Statutes of Arizona, 1913, of such character that their irreparable injury might be enjoined, and secondly, that upon its face the complaint showed a want of equity.

The Superior Court for Cochise County sustained the demurrer and dismissed the complaint, and this judgment was affirmed by the Supreme Court of Arizona.

The ruling of the Supreme Court proceeded first on the assumption that the gravamen of the complaint was that the defendants were merely inducing patrons to cease their patronage by making public the fact of the dispute and the attitude of plaintiffs in it, and, secondly, on the proposition that, while good will is a valuable factor in business success, "no man . . . has a vested property right in the esteem of the public," that, while the plaintiff had a clear right to refuse the demand of the union, the union had a right to advertise the cause of the strike. The court held that the purpose of Paragraph 1464 was to recognize the right of workmen on a strike to use peaceable means to accomplish the lawful ends for which the strike was called; that picketing, if peaceably carried on for a lawful purpose, was no violation of the rights of the person whose place of business was picketed; that, prior to the enactment of Paragraph 1464, picketing was unlawful in Arizona because it was presumed to induce breaches of the peace, but that plaintiffs had no vested right to have such a rule of law continue in that State; that under Paragraph 1464 picketing was no longer conclusively presumed to be unlawful; that the paragraph simply dealt with a rule of evidence requiring the courts to substitute evidence of the nature of the act for the presumption otherwise arising; that the plaintiffs' property rights were not invaded by picketing unless the

picketing interfered with the free conduct of the business; that plaintiffs did not claim that defendants had by violent means invaded their rights, and that if that kind of picketing were charged and established by proof plaintiffs would be entitled to relief to the extent of prohibiting violence in any form.

The effect of this ruling is that, under the statute, loss may be inflicted upon the plaintiffs' property and business by "picketing" in any form if violence be not used, and that, because no violence was shown or claimed, the campaign carried on, as described in the complaint and exhibits, did not unlawfully invade complainants' rights.

The facts alleged are admitted by the demurrer, and in determining their legal effect as a deprivation of plaintiffs' legal rights under the Fourteenth Amendment, we are at as full liberty to consider them as was the State Supreme Court. *Mackay* v. *Dillon*, 4 How. 421; *Dower* v. *Richards*, 151 U. S. 658, 667. Nor does the court's declaration that the statute is a rule of evidence bind us in such an investigation. *Bailey* v. *Alabama*, 219 U. S. 219, 238, 239; *Chicago, Milwaukee & St. Paul Ry. Co.* v. *Minnesota*, 134 U. S. 418; *Mugler* v. *Kansas*, 123 U. S. 623, 661; *Corn Products Refining Co.* v. *Eddy*, 249 U. S. 427, 432. In cases brought to this court from state courts for review, on the ground that a federal right set up in the state court has been wrongly denied, and in which the state court has put its decision on a finding that the asserted federal right has no basis in point of fact or has been waived or lost, this court as an incident of its power to determine whether a federal right has been wrongly denied, may go behind the finding to see whether it is without substantial support. If the rule were otherwise, it almost always would be within the power of a state court practically to prevent a review here. *Kansas City Southern Ry. Co.* v. *Albers Commission Co.*, 223 U. S. 573, 591, 593; *Cedar Rapids Gas Light Co.* v. *Cedar Rapids*, 223 U. S. 655, 668,

669; *Southern Pacific Co.* v. *Schuyler*, 227 U. S. 601, 611. Another class of cases in which this court will review the finding of the court as to the facts is when the conclusion of law and findings of fact are so intermingled as to make it necessary, in order to pass upon the question to analyze the facts. *Northern Pacific Ry. Co.* v. *North Dakota*, 236 U. S. 585, 593; *Jones National Bank* v. *Yates*, 240 U. S. 541, 552, 553. In view of these decisions and the grounds upon which they proceed, it is clear that in a case like the present, where the issue is whether a state statute in its application to facts which are set out in detail in the pleadings and are admitted by demurrer, violates the Federal Constitution, this court must analyze the facts as averred and draw its own inferences as to their ultimate effect, and is not bound by the conclusion of the State Supreme Court in this regard. The only respect in such a case in which this court is bound by the judgment of the State Supreme Court is in the construction which that court puts upon the statute.

The complaint and its exhibits make this case:

The defendants conspired to injure and destroy plaintiffs' business by inducing their theretofore willing patrons and would-be patrons not to patronize them and they influenced these to withdraw or withhold their patronage:

(1) By having the agents of the union walk forward and back constantly during all the business hours in front of plaintiffs' restaurant and within five feet thereof, displaying a banner announcing in large letters that the restaurant was unfair to cooks and waiters and their union.

(2) By having agents attend at or near the entrance of the restaurant during all business hours and continuously announce in a loud voice, audible for a great distance, that the restaurant was unfair to the labor union.

(3) By characterizing the employees of the plaintiffs as scab Mexican labor, and using opprobrious epithets con-

cerning them in handbills continuously distributed in front of the restaurant to would-be customers.

(4) By applying in such handbills abusive epithets to Truax, the senior member of plaintiffs' firm, and making libelous charges against him, to the effect that he was tyrannical with his help, and chased them down the street with a butcher knife, that he broke his contract and repudiated his pledged word; that he had made attempts to force cooks and waiters to return to work by attacks on men and women; that a friend of Truax assaulted a woman and pleaded guilty; that plaintiff was known by his friends, and that Truax's treatment of his employees was explained by his friend's assault; that he was a "bad actor."

(5) By seeking to disparage plaintiffs' restaurant, charging that the prices were higher and the food worse than in any other restaurant, and that assaults and slugging were a regular part of the bill of fare, with police indifferent.

(6) By attacking the character of those who did patronize, saying that their mental calibre and moral fibre fell far below the American average, and enquiring of the would-be patrons—Can you patronize such a place and look the world in the face?

(7) By threats of similar injury to the would-be patrons—by such expressions as "All ye who enter here leave all hope behind." "Don't be a traitor to humanity"; by offering a reward for any of the ex-members of the union caught eating in the restaurant; by saying in the handbills: "We are also aware that handbills and banners in front of a business house on the main street give the town a bad name, but they are permanent institutions until William Truax agrees to the eight-hour day."

(8) By warning any person wishing to purchase the business from the Truax firm that a donation would be necessary, amount to be fixed by the District Trades As-

sembly, before the picketing and boycotting would be given up.

The result of this campaign was to reduce the business of the plaintiffs from more than $55,000 a year to one of $12,000.

Plaintiffs' business is a property right (*Duplex Printing Press Co.* v. *Deering*, 254 U. S. 443, 465) and free access for employees, owner and customers to his place of business is incident to such right. Intentional injury caused to either right or both by a conspiracy is a tort. Concert of action is a conspiracy if its object is unlawful or if the means used are unlawful. *Pettibone* v. *United States*, 148 U. S. 197, 203; *Duplex Printing Press Co.* v. *Deering*, *supra*. Intention to inflict the loss and the actual loss caused are clear. The real question here is, were the means used illegal? The above recital of what the defendants did, can leave no doubt of that. The libelous attacks upon the plaintiffs, their business, their employees, and their customers, and the abusive epithets applied to them were palpable wrongs. They were uttered in aid of the plan to induce plaintiffs' customers and would-be customers to refrain from patronizing the plaintiffs. The patrolling of defendants immediately in front of the restaurant on the main street and within five feet of plaintiffs' premises continuously during business hours, with the banners announcing plaintiffs' unfairness; the attendance by the picketers at the entrance to the restaurant and their insistent and loud appeals all day long, the constant circulation by them of the libels and epithets applied to employees, plaintiffs and customers, and the threats of injurious consequences to future customers, all linked together in a campaign, were an unlawful annoyance and a hurtful nuisance in respect of the free access to the plaintiffs' place of business. It was not lawful persuasion or inducing. It was not a mere appeal to the sympathetic aid of would-be customers by a simple statement of the

fact of the strike and a request to withhold patronage. It was compelling every customer or would-be customer to run the gauntlet of most uncomfortable publicity, aggressive and annoying importunity, libelous attacks and fear of injurious consequences, illegally inflicted, to his reputation and standing in the community. No wonder that a business of $50,000 was reduced to only one-fourth of its former extent. Violence could not have been more effective. It was moral coercion by illegal annoyance and obstruction and it thus was plainly a conspiracy.

It would consume too great space to refer to the mass of authority which sustains this conclusion. It is sufficient to cite the general discussion of the subject in *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418, 439. Well known decisions on similar facts are *Sherry* v. *Perkins*, 147 Mass. 212; *Barr* v. *Essex Trades Council*, 53 N. J. Eq. 101; *Purvis* v. *Local No. 500*, 214 Pa. St. 348; *Wilson* v. *Hey*, 232 Ill. 389; *Casey* v. *Cincinnati Typographical Union*, 45 Fed. 135; *Pierce* v. *Stablemen's Union*, 156 Cal. 70.

A law which operates to make lawful such a wrong as is described in plaintiffs' complaint deprives the owner of the business and the premises of his property without due process, and can not be held valid under the Fourteenth Amendment.

The opinion of the State Supreme Court in this case if taken alone seems to show that the statute grants complete immunity from any civil or criminal action to the defendants, for it pronounces their acts lawful. If, however, we are to assume that the criminal laws of Arizona do provide prosecution for such libels against the plaintiffs though committed by this particular class of tort feasors, (*Truax* v. *Bisbee Local No. 380*, 19 Ariz. 379), still the tort here committed was not a mere libel of plaintiffs. That would not have had any such serious consequences. The libel of the plaintiffs here was not the cause of the

injury; it was only one step or link in a conspiracy, unlawfully to influence customers.

It is argued that, while the right to conduct a lawful business is property, the conditions surrounding that business, such as regulations of the State for maintaining peace, good order, and protection against disorder, are matters in which no person has a vested right. The conclusion to which this inevitably leads in this case is that the State may withdraw all protection to a property right by civil or criminal action for its wrongful injury if the injury is not caused by violence. This doctrine is supposed to find support in the case of *New York Central R. R. Co.* v. *White*, 243 U. S. 188, 198, and cases there cited. These cases, all of them, relate to the liabilities of employers to employees growing out of the relation of employment for injuries received in the course of employment. They concern legislation as to the incidents of that relation. They affirm the power of the State to vary the rules of the common law as to the fellow servant doctrine, assumption of risk, and negligence, in that relation. They hold that employers have no vested right in those rules of the common law. The broad distinction between one's right to protection against a direct injury to one's fundamental property right by another who has no special relation to him, and one's liability to another with whom he establishes a voluntary relation under a statute is manifest upon its statement. It is true that no one has a vested right in any particular rule of the common law, but it is also true that the legislative power of a State can only be exerted in subordination to the fundamental principles of right and justice which the guaranty of due process in the Fourteenth Amendment is intended to preserve, and that a purely arbitrary or capricious exercise of that power whereby a wrongful and highly injurious invasion of property rights, as here, is practically sanctioned and the

owner stripped of all real remedy, is wholly at variance with those principles.

It is to be observed that this is not the mere case of a peaceful secondary boycott as to the illegality of which courts have differed and States have adopted different statutory provisions. A secondary boycott of this kind is where many combine to injure one in his business by coercing third persons against their will to cease patronizing him by threats of similar injury. In such a case the many have a legal right to withdraw their trade from the one, they have the legal right to withdraw their trade from third persons, and they have the right to advise third persons of their intention to do so when each act is considered singly. The question in such cases is whether the moral coercion exercised over a stranger to the original controversy by steps in themselves legal becomes a legal wrong. But here the illegality of the means used is without doubt and fundamental. The means used are the libelous and abusive attacks on the plaintiffs' reputation, like attacks on their employees and customers, threats of such attacks on would-be customers, picketing and patrolling of the entrance to their place of business, and the consequent obstruction of free access thereto—all with the purpose of depriving the plaintiffs of their business. To give operation to a statute whereby serious losses inflicted by such unlawful means are in effect made remediless, is, we think, to disregard fundamental rights of liberty and property and to deprive the person suffering the loss of due process of law.

If, however, contrary to the construction which we put on the opinion of the Supreme Court of Arizona, it does not withhold from the plaintiffs all remedy for the wrongs they suffered but only the equitable relief of injunction, there still remains the question whether they are thus denied the equal protection of the laws.

The Arizona constitution provides that the superior court shall have jurisdiction in all cases of equity and, in pursuance of this provision, Paragraph 1456 of the Revised Statutes of Arizona, 1913, declares:

"Judges of the superior courts may grant writs of injunction, returnable to said courts, in the following cases:

"1. Where it shall appear that the party applying for such writ is entitled to the relief demanded, and such relief or any part thereof requires the restraint of some act prejudicial to the applicant.

"2. Where, pending litigation, it shall be made to appear that a party is doing some act respecting the subject of litigation, or threatens, or is about to do some act, or is procuring or suffering the same to be done, in violation of the rights of the applicant, which act would tend to render the judgment ineffectual.

"3. In all other cases where the applicant for such writ may show himself entitled thereto under the principles of equity."

The necessary effect of these provisions and of Paragraph 1464 is that the plaintiffs in error would have had the right to an injunction against such a campaign as that conducted by the defendants in error, if it had been directed against the plaintiffs' business and property in any kind of a controversy which was not a dispute between employer and former employees. If the competing restaurant keepers in Bisbee had inaugurated such a campaign against the plaintiffs in error and conducted it with banners and handbills of a similar character, an injunction would necessarily have issued to protect the plaintiffs in the enjoyment of their property and business.

This brings us to consider the effect in this case of that provision of the Fourteenth Amendment which forbids any State to deny to any person the equal protection of the laws. The clause is associated in the Amendment

with the due process clause and it is customary to consider them together. It may be that they overlap, that a violation of one may involve at times the violation of the other, but the spheres of the protection they offer are not coterminous. The due process clause, brought down from Magna Charta, was found in the early state constitutions, and later in the Fifth Amendment to the Federal Constitution as a limitation upon the executive, legislative and judicial powers of the Federal Government, while the equality clause does not appear in the Fifth Amendment and so does not apply to congressional legislation. The due process clause requires that every man shall have the protection of his day in court, and the benefit of the general law, a law which hears before it condemns, which proceeds not arbitrarily or capriciously but upon inquiry, and renders judgment only after trial, so that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society. *Hurtado* v. *California*, 110 U. S. 516, 535. It, of course, tends to secure equality of law in the sense that it makes a required minimum of protection for every one's right of life, liberty and property, which the Congress or the legislature may not withhold. Our whole system of law is predicated on the general, fundamental principle of equality of application of the law. "All men are equal before the law," "This is a government of laws and not of men," "No man is above the law," are all maxims showing the spirit in which legislatures, executives and courts are expected to make, execute and apply laws. But the framers and adopters of this Amendment were not content to depend on a mere minimum secured by the due process clause, or upon the spirit of equality which might not be insisted on by local public opinion. They therefore embodied that spirit in a specific guaranty.

The guaranty was aimed at undue favor and individual or class privilege, on the one hand, and at hostile dis-

crimination or the oppression of inequality, on the other. It sought an equality of treatment of all persons, even though all enjoyed the protection of due process. Mr. Justice Field, delivering the opinion of this court in *Barbier* v. *Connolly*, 113 U. S. 27, 32, of the equality clause, said—"Class legislation, discriminating against some and favoring others, is prohibited, but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment." In *Hayes* v. *Missouri*, 120 U. S. 68, the court speaking through the same Justice said the Fourteenth Amendment "does not prohibit legislation which is limited either in the objects to which it is directed, or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed." Thus the guaranty was intended to secure equality of protection not only for all but against all similarly situated. Indeed, protection is not protection unless it does so. Immunity granted to a class, however limited, having the effect to deprive another class, however limited, of a personal or property right, is just as clearly a denial of equal protection of the laws to the latter class as if the immunity were in favor of, or the deprivation of right permitted worked against, a larger class.

Mr. Justice Matthews, in *Yick Wo* v. *Hopkins*, 118 U. S. 356, 369, speaking for the court of both the due process and the equality clause of the Fourteenth Amendment, said:

"These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; *and the equal protection of the laws is a pledge of the protection of equal laws.*"

The accuracy and comprehensive felicity of this description of the effect of the equality clause are shown by the frequency with which it has been quoted in the decisions of this court. It emphasizes the additional guaranty of a right which the clause has conferred beyond the requirement of due process.

With these views of the meaning of the equality clause, it does not seem possible to escape the conclusion that by the clauses of Paragraph 1464 of the Revised Statutes of Arizona, here relied on by the defendants, as construed by its Supreme Court, the plaintiffs have been deprived of the equal protection of the law.

It is beside the point to say that plaintiffs had no vested right in equity relief and that taking it away does not deprive them of due process of law. If, as is asserted, the granting of equitable remedies falls within the police power and is a matter which the legislature may vary as its judgment and discretion shall dictate, this does not meet the objection under the equality clause which forbids the granting of equitable relief to one man and the denying of it to another under like circumstances and in the same territorial jurisdiction. The Fourteenth Amendment, as this court said in *Barbier* v. *Connolly*, already cited, intended "not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; *that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts;* that no impediment should be interposed to the pursuits of any one except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one

than are laid upon others in the same calling and condition, and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offences."

If, as claimed, the legislature has full discretion to grant or withhold equitable relief in any class of cases, indeed to take away from its courts all equity jurisdiction and leave those who are wronged to suits at law or to protection by the criminal law, the legislature has the same power in respect to the declaration of crimes. Suppose the legislature of the State were to provide that such acts as were here committed by defendants, to wit, the picketing or patrolling of the sidewalk and street in front of the store or business house of any person and the use of handbills of an abusive and libelous character against the owner and present and future customers with intent to injure the business of the owner, should be a public nuisance and be punishable by fine and imprisonment, and were to except ex-employees from its penal provisions. Is it not clear that any defendant could escape punishment under it on the ground that the statute violated the equality clause of the Fourteenth Amendment? That is the necessary effect of *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, where an anti-trust act was held invalid under this same clause because it contained the excepting provision that it should "not apply to agricultural products or live stock while in the hands of the producer or raiser." That was a stronger case than this because there the whole statute was one dealing with economic policy and was a declaration of *mala prohibita* that had theretofore been lawful, from which it was strongly argued that the exception was justified in the interest of agriculture, and was a proper exception by permissible classification. Here is a direct invasion of the ordinary business and property rights of a person, unlawful when committed by any one, and remediable because

of its otherwise irreparable character by equitable process, except when committed by ex-employees of the injured person. If this is not a denial of the equal protection of the laws, then it is hard to conceive what would be. To hold it not to be, would be, to use the expression of Mr. Justice Brewer in *Gulf, Colorado & Santa Fe Ry. Co.* v. *Ellis*, 165 U. S. 150, 154, to make the guaranty of the equality clause "a rope of sand."

In *Missouri* v. *Lewis*, 101 U. S. 22, we find one of the earlier and one of the most helpful discussions of the application of the equality clause to judicial procedure by Mr. Justice Bradley speaking for this court. In that case one who had been disbarred by the Court of Appeals of St. Louis sought to avoid the effect of this action by the contention that he was denied the equal protection of the laws because he was not given the right of appeal to the Supreme Court of the State, granted to litigants in the State, except in St. Louis and three other counties. It was held that the equality clause did not apply because the state legislature had the right to vary the system of courts and procedure in various parts of the State. Mr. Justice Bradley said (p. 30):

"The last restriction, as to the equal protection of the laws, is not violated by any diversity in the jurisdiction of the several courts as to subject-matter, amount, or finality of decision, if all persons within the territorial limits of their respective jurisdictions have an equal right, in like cases and under like circumstances, to resort to them for redress." Again (p. 31):

"For, as before said, it [i. e., the equality clause] has respect to persons and classes of persons. It means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances."

To sustain the distinction here between the ex-employees and other tort feasors in the matter of remedies

against them, it is contended that the legislature may establish a class of such ex-employees for special legislative treatment. In adjusting legislation to the need of the people of a State, the legislature has a wide discretion and it may be fully conceded that perfect uniformity of treatment of all persons is neither practical nor desirable, that classification of persons is constantly necessary and that questions of proper classification are not free from difficulty. But we venture to think that not in any of the cases in this court has classification of persons of sound mind and full responsibility, having no special relation to each other, in respect of remedial procedure for an admitted tort been sustained. Classification must be reasonable. As was said in *Gulf, Colorado & Santa Fe Ry. Co.* v. *Ellis*, 165 U. S. 155, classification "must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without such basis." As was said in *Magoun* v. *Illinois Trust & Savings Bank*, 170 U. S. 283, 293: "The rule [i. e., of the equality clause] is not a substitute for municipal law; it only prescribes that that law have the attribute of equality of operation, and equality of operation does not mean indiscriminate operation on persons merely as such, but on persons according to their relations." The same principle is repeated and enforced in *Southern Ry. Co.* v. *Greene*, 216 U. S. 400, 417: "While reasonable classification is permitted, without doing violence to the equal protection of the laws, such classification must be based upon some real and substantial distinction, bearing a reasonable and just relation to the things in respect to which such classification is imposed; and classification cannot be arbitrarily made without any substantial basis." Classification is the most inveterate of our reasoning processes. We can scarcely think or speak without consciously or unconsciously exercising it. It must therefore obtain in

and determine legislation; but it must regard real resemblances and real differences between things, and persons, and class them in accordance with their pertinence to the purpose in hand. Classification like the one with which we are here dealing is said to be the development of the philosophic thought of the world and is opening the door to legalized experiment. When fundamental rights are thus attempted to be taken away, however, we may well subject such experiment to attentive judgment. The Constitution was intended, its very purpose was, to prevent experimentation with the fundamental rights of the individual. We said through Mr. Justice Brewer, in *Muller* v. *Oregon*, 208 U. S. 412, that "it is the peculiar value of a written constitution that it places in unchanging form limitations upon legislative action, and thus gives a permanence and stability to popular government which otherwise would be lacking."

It is urged that this court has frequently recognized the special classification of the relations of employees and employers as proper and necessary for the welfare of the community and requiring special treatment. This is undoubtedly true, but those cases, the *Second Employers' Liability Cases*, 223 U. S. 1; *New York Central R. R. Co.* v. *White*, 243 U. S. 188; *Hawkins* v. *Bleakly*, 243 U. S. 210; *Mountain Timber Co.* v. *Washington*, 243 U. S. 219; *Middleton* v. *Texas Power & Light Co.*, 249 U. S. 152, and *Arizona Employers' Liability Cases*, 250 U. S. 400, as we have already pointed out in discussing the due process clause, were cases of the responsibility of the employer for injuries sustained by employees in the course of their employment. The general end of such legislation is that the employer shall become the insurer of the employee against injuries from the employment without regard to the negligence, if any, through which it occurred, leaving to the employer to protect himself by insurance and to compensate himself for the additional cost of production

by adding to the prices he charges for his products. It seems a far cry from classification on the basis of the relation of employer and employee in respect of injuries received in course of employment to classification based on the relation of an employer, not to an employee, but to one who has ceased to be so, in respect of torts thereafter committed by such ex-employee on the business and property right of the employer. It is really a little difficult to say, if such classification can be sustained, why special legislative treatment of assaults upon an employer or his employees by ex-employees may not be sustained with equal reason. It is said the State may deal separately with such disputes because such controversies are a frequent and characteristic outgrowth of disputes over terms and conditions of employment. Violence of ex-employees toward present employees is also a characteristic of such disputes. Would this justify a legislature in excepting ex-employees from criminal prosecution for such assaults and leaving the assaulted persons to suits for damages at common law?

Our conclusion, that plaintiffs are denied the equal protection of the laws, is sustained by the decisions in this court in *Truax* v. *Raich*, 239 U. S. 33; *Atchison, Topeka & Santa Fe Ry. Co.* v. *Vosburg*, 238 U. S. 56; *Southern Ry. Co.* v. *Greene*, 216 U. S. 400; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540; *Cotting* v. *Kansas City Stock Yards Co.*, 183 U. S. 79; *Gulf, Colorado & Santa Fe Ry. Co.* v. *Ellis*, 165 U. S. 150. In the state courts, we find equal support for it. *Bogni* v. *Perotti*, 224 Mass. 152; *Pearson* v. *Portland*, 69 Me. 278; *Goldberg, Bowen & Co.* v. *Stablemen's Union*, 149 Cal. 429, 434; *Pierce* v. *Stablemen's Union*, 156 Cal. 70, 74; *Funkhouser* v. *Randolph*, 287 Ill. 94; *Houston* v. *Pulitzer Publishing Co.*, 249 Mo. 332; *Phipps* v. *Wisconsin Central Ry. Co.*, 133 Wisc. 153; *Park* v. *Detroit Free Press Co.*, 72 Mich. 560; *C., N. O. & T. P. Ry. Co.* v. *Clark & Bennett*, 11 Ky. Law Rep. 286.

It is urged that in holding Paragraph 1464 invalid, we are in effect holding invalid § 20 of the Clayton Act. Of course, we are not doing so. In the first place, the equality clause of the Fourteenth Amendment does not apply to congressional but only to state action. In the second place, § 20 of the Clayton Act never has been construed or applied as the Supreme Court of Arizona has construed and applied Paragraph 1464 in this case.

We have but recently considered the clauses of § 20 of the Clayton Act, sometimes erroneously called the "picketing" clauses. *American Steel Foundries* v. *Tri-City Central Trades Council, ante,* 184. They forbid an injunction in labor controversies prohibiting any person "from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do."

We held that under these clauses picketing was unlawful, and that it might be enjoined as such, and that peaceful picketing was a contradiction in terms which the statute sedulously avoided, but that, subject to the primary right of the employer and his employees and would-be employees to free access to his premises without obstruction by violence, intimidation, annoyance, importunity or dogging, it was lawful for ex-employees on a strike and their fellows in a labor union to have a single representative at each entrance to the plant of the employer to announce the strike and peaceably to persuade the employees and would-be employees to join them in it. We held that these clauses were merely declaratory of what had always been the law and the best practice in equity, and we thus applied them. The construction put

upon the same words by the Arizona Supreme Court makes these clauses of Paragraph 1464 as far from those of § 20 of the Clayton Act in meaning as if they were in wholly different language.

We conclude that the demurrer in this case should have been overruled, the defendants required to answer, and that if the evidence sustained the averments of the complaint, an injunction should issue as prayed.

Objection is made to this conclusion on the ground that as we hold certain clauses of Paragraph 1464 of the Arizona Code, as construed, invalid, they can not be separated from Paragraph 1456 which must also be held invalid and then there is no law in Arizona authorizing an injunction in this or any case. *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, is cited to sustain this view. There a new anti-trust statute was enacted making criminal and subject to injunction what before had not been so. The exception from its operation of products of the farm in the hands of the producers, contained in the law as enacted, was declared to be a denial of equal protection of the laws, and the whole law was declared invalid because the court in view of the exception could not assume that the legislature would have enacted the law, had it known that the producers of farm products would have come within its terms. But here the case is quite different. Paragraph 1456 has been the statute law of Arizona, State and Territory, since 1901. It was first adopted in the Code of the Territory of 1901. It was continued in force, by virtue of the new constitution of Arizona adopted by the people in 1912, which merely changed the name of the court, upon which general equity jurisdiction was conferred, from the District Court to the Superior Court, and which provided that the authority, jurisdiction, practice and procedure of the district courts should continue in force and apply and govern superior courts until altered or repealed. Arizona came into the

Union with this constitution February 14, 1912. At the session of 1912 provision was made for revision and codification of the laws. The present Code was adopted by the legislature at its third special session of 1913. Paragraph 1464 was passed, as the Code itself states, at the second session of 1913. Thus Paragraph 1464 was an amendment to Paragraph 1456, and was included with the original section in the code revision of 1913. To invalidate Paragraph 1456 we must assume that had the legislature known that the clauses of Paragraph 1464 here involved, construed as the Arizona Supreme Court has construed them, were unconstitutional, it would have repealed all the existing law conferring the equitable power of injunction on its first instance courts of general jurisdiction. We can not make this assumption. The exception introduced by amendment to Paragraph 1456 proving invalid, the original law stands without the amendatory exception.

The judgment of the Supreme Court of Arizona is reversed and the case remanded for further proceedings not inconsistent with this opinion.

MR. JUSTICE HOLMES, dissenting.

The dangers of a delusive exactness in the application of the Fourteenth Amendment have been adverted to before now. *Louisville & Nashville R. R. Co.* v. *Barber Asphalt Paving Co.*, 197 U. S. 430, 434. Delusive exactness is a source of fallacy throughout the law. By calling a business "property" you make it seem like land, and lead up to the conclusion that a statute cannot substantially cut down the advantages of ownership existing before the statute was passed. An established business no doubt may have pecuniary value and commonly is protected by law against various unjustified injuries. But you cannot give it definiteness of contour by calling it a thing. It is a course of conduct and like other conduct is

subject to substantial modification according to time and circumstances both in itself and in regard to what shall justify doing it a harm. I cannot understand the notion that it would be unconstitutional to authorize boycotts and the like in aid of the employees' or the employers' interest by statute when the same result has been reached constitutionally without statute by Courts with whom I agree. See *The Hamilton*, 207 U. S. 398, 404. In this case it does not even appear that the business was not created under the laws as they now are. *Denny* v. *Bennett*, 128 U. S. 489.

I think further that the selection of the class of employers and employees for special treatment, dealing with both sides alike, is beyond criticism on principles often asserted by this Court. And especially I think that without legalizing the conduct complained of the extraordinary relief by injunction may be denied to the class. Legislation may begin where an evil begins. If, as many intelligent people believe, there is more danger that the injunction will be abused in labor cases than elsewhere I can feel no doubt of the power of the legislature to deny it in such cases. I refer to two decisions in which I have stated what I understand to be the law sanctioned by many other decisions. *Carroll* v. *Greenwich Insurance Co.*, 199 U. S. 401, 411. *Quong Wing* v. *Kirkendall*, 223 U. S. 59.

In a matter like this I dislike to turn attention to anything but the fundamental question of the merits, but *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, raises at least a doubt in my mind of another sort. The exception and the rule as to granting injunctions are both part of the same code, enacted at the same time. If the exception fails, according to the *Connolly Case* the statute is bad as a whole. It is true that here the exception came in later than the rule, but after they had been amalgamated in a single act I cannot know that the later legis-

lature would have kept the rule if the exception could not be allowed. If labor had the ascendancy that the exception seems to indicate, I think that probably it would have declined to allow injunctions in any case if that was the only way of reaching its end. But this is a matter upon which the State Court has the last word, and if it takes this view its decision must prevail. I need not press further the difficulty of requiring a State Court to issue an injunction that it never has been empowered to issue by the quasi-sovereign that created the Court.

I must add one general consideration. There is nothing that I more deprecate than the use of the Fourteenth Amendment beyond the absolute compulsion of its words to prevent the making of social experiments that an important part of the community desires, in the insulated chambers afforded by the several States, even though the experiments may seem futile or even noxious to me and to those whose judgment I most respect. I agree with the more elaborate expositions of my brothers Pitney and Brandeis and in their conclusion that the judgment should be affirmed.

MR. JUSTICE PITNEY, with whom concurred MR. JUSTICE CLARKE, dissenting.

The Supreme Court of the State of Arizona sustained, against objections raised by plaintiffs in error under the "due process of law" and "equal protection" clauses of the Fourteenth Amendment, a statutory provision found in Paragraph 1464, Arizona Civil Code 1913, which restricts the employment of the process of injunction against what are called peaceful picketing and boycotting under certain circumstances, in terms similar to those found in § 20 of the Clayton Act of Congress (October 15, 1914, c. 323, 38 Stat. 730, 738).[1]

[1] 1464. No restraining order or injunction shall be granted by any court of this state, or a judge or the judges thereof, in any case be-

312. PITNEY and CLARKE, JJ., dissenting.

Plaintiffs in error, who were plaintiffs in the trial court and appellants in the Supreme Court of the State, were engaged in the business of conducting a restaurant in Bisbee, enjoying and dependent for success upon the good will, custom, and patronage of the public; defendants had been employed, in one capacity or another, in the restaurant, and were members of a local labor union. A dispute arose concerning the terms and conditions of the employment, and in the course of it demands were made upon plaintiffs by the union, with which plaintiffs refused to comply. Because of this the union ordered a strike of all its members then employed by plaintiffs, and defendants joined in the strike and left plaintiffs' employ. Thereupon, for the purpose of winning the strike and

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tween an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving or growing out of a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property or to a property right of the party making the application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.

And no such restraining order or injunction shall prohibit any person or persons from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at or near a house or place where any person resides or works, or carries on business, or happens to be for the purpose of peaceably obtaining or communicating information, or of peaceably persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute; or from recommending, advising, or persuading others by peaceful means so to do; or from paying or giving to or withholding from any person engaged in such dispute any strike benefits or other moneys or things of value; or from peaceably assembling at any place in a lawful manner and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto.

coercing plaintiffs into complying with the demands of the union, defendants and numerous other persons unknown combined to inaugurate and did inaugurate a boycott of plaintiffs and their restaurant business, in order to induce plaintiffs' customers and patrons to refrain from patronizing the restaurant. In furtherance of the boycott defendants caused persons to walk back and forth along the street in front of the restaurant and near to the entrance during business hours, carrying banners bearing conspicuous notices denouncing plaintiffs as unfair to organized labor, etc., and caused printed handbills to be distributed among plaintiffs' customers and patrons recommending and attempting to persuade them to refrain from patronizing the restaurant. Having sustained serious pecuniary loss, and being threatened with further and irreparable damage, plaintiffs brought suit for injunction, setting up that defendants were relying upon the provisions of Paragraph 1464 of the Civil Code, and praying that this might be held violative of the Fourteenth Amendment and that they might have an injunction and other relief.

The Supreme Court, conceding that prior to the enactment of Paragraph 1464 picketing carried on in any manner, even in a concededly peaceable manner, was unlawful by the law of Arizona, nevertheless, upon authority of a previous case decided by it upon substantially identical facts (*Truax* v. *Bisbee Local No. 380*, 19 Ariz. 379, 392), held that relief was barred by the statute. 20 Ariz. 7.

Upon the facts, it hardly could be said that defendants kept within the bounds of a "peaceful" picket or boycott. They appear to have gone beyond mere attempts to persuade plaintiffs' customers to withdraw their patronage, and to have resorted to abusive and threatening language towards the patrons themselves. The court declared, however, that the statute established a new rule

of evidence for determining whether picketing was peaceful and not otherwise unlawful; and that, measured by the standard thus prescribed, defendants were not subject to injunction. By this construction we are bound, and the only question is whether by the statute as so construed, and as applied to the facts of the case, plaintiffs are deprived of rights secured to them by the Fourteenth Amendment.

As to this, I regret that I am not in accord with the views of the majority of the court. Expressing no opinion as to the wisdom, or policy, or propriety in the general sense, of Paragraph 1464—with neither of which is our duty concerned—I consider first, whether, as construed and applied, it has the effect of depriving plaintiffs in error of their liberty or property without due process of law.

It is beside the question to discuss whether, under the rules of the common law or the general principles of justice, picketing or boycotting, or the conduct of defendants however described, is lawful. The Supreme Court of Arizona virtually conceded that in that State, in the absence of statute, they were not. The question is whether in this respect the law might be altered by act of legislation, to the extent of depriving a party aggrieved, and threatened with irreparable injury, of relief by injunction.

That the right to conduct a lawful business, and thereby acquire pecuniary profits, is property, is indisputable. That the state of society, and the existing condition of good order, or the opposite, surrounding the business, and its liability to or immunity from interruption through particular forms of disorder, affect its profitableness, likewise is plain. But it seems to me clear that, so far as these result from the general operation of the laws and regulations established by authority of the State for maintaining the peace, good order, and tranquility of its people and affording protection against disturbing ele-

ments and ill-disposed persons, those laws and regulations, as rules of conduct and measures of relief, are subject to be changed in the normal exercise of the legislative power of the State. That no person has a vested interest in any rule of law, entitling him to have it remain unaltered for his benefit, is a principle thoroughly settled by numerous decisions of this court, and having general application, not confined at all to the rights and liabilities existing between employers and employees, or between persons formerly occupying that relation. *Munn* v. *Illinois*, 94 U. S. 113, 134; *Hurtado* v. *California*, 110 U. S. 516, 532; *Second Employers' Liability Cases*, 223 U. S. 1, 50; *Chicago & Alton R. R. Co.* v. *Tranbarger*, 238 U. S. 67, 76; *New York Central R. R. Co.* v. *White*, 243 U. S. 188, 198.

The use of the process of injunction to prevent disturbance of a going business by such a campaign as defendants here have conducted, is in the essential sense a measure of police regulation. And just as the States have a broad discretion about establishing police regulations, so they have a discretion, equally broad, about modifying and relaxing them. They may adopt the common law, or some other system, as their own judgment of the interests of their people may determine. They have general dominion, and, saving as restricted by particular provisions of the Federal Constitution, complete dominion over all persons, property, and business transactions within their borders; and in regulating its internal affairs a State may establish by legislation a policy differing in one or more respects from those of other States, just as it might establish a like difference through the decisions of its courts.

Hence, I have no doubt that, without infringing the "due process" clause, a State might by statute establish protection against picketing or boycotting however conducted, just as many States have done by holding them to be contrary to the common law, recognizing a property

value in a going business, and applying equitable principles in safeguarding it from irreparable injury through interference found unwarranted. *Vegelahn* v. *Guntner*, 167 Mass. 92, 97–98; *Beck* v. *Railway Teamsters' Protective Union*, 118 Mich. 497, 520–521; *Barnes & Co.* v. *Chicago Typographical Union*, 232 Ill. 424, 435, 437; *Jensen* v. *Cooks' & Waiters' Union*, 39 Wash. 531, 536; *St. Germain* v. *Bakery & Confectionery Workers' Union*, 97 Wash. 282, 289, 295; *Jonas Glass Co.* v. *Glass Bottle Blowers' Association*, 77 N. J. Eq. 219, 222–224. And, just as one State might establish such protection by statute, so another State may by statute disestablish the protection, even as States have differed in their judicial determination of the general law upon the subject. In neither case can I find ground for declaring that the State's action is so arbitrary and devoid of reasonable basis that it can be called a deprivation of liberty or property without due process of law, in the constitutional sense. In truth, the States have a considerable degree of latitude in determining, each for itself, their respective conditions of law and order, and what kind of civilization they shall have as a result.

Paragraph 1464 does not modify any substantive rule of law, but only restricts the processes of the courts of equity. Ordinary legal remedies remain; and I cannot believe that the use of the injunction in such cases—however important—is so essential to the right of acquiring, possessing and enjoying property that its restriction or elimination amounts to a deprivation of liberty or property without due process of law, within the meaning of the Fourteenth Amendment.

Secondly, it is said that Paragraph 1464, Arizona Civil Code, denies to plaintiffs in error the "equal protection of the laws;" but it seems to me evident that it does not offend in this regard. Examination shows that it does not discriminate against the class to which plaintiffs belong

in favor of any other. It applies not only to cases between employers and employees, irrespective of who is plaintiff and who defendant, but to cases between employees, and between persons employed and those seeking employment. And it applies equally to all persons coming within its reach.

It is said that because, under other provisions of the Arizona statute law, plaintiffs would have been entitled to an injunction against such a campaign as that conducted by defendants, had it been in a controversy other than a dispute between employer and former employees—for instance, had competing restaurant-keepers been the offenders—refusal of relief in the particular case by force of Paragraph 1464 is undue favoritism to the class of which defendants are members. But I submit with deference that this is not a matter of which plaintiffs are entitled to complain under the "equal protection" clause. There is no discrimination *as against them;* others situated like them are accorded no greater right to an injunction than is accorded to them. Whatever complaint the competing restaurant-keepers might have, if in the case supposed they were subject to be stopped by an injunction where former employees were not, it would not be a denial of equal protection to plaintiffs. Cases arising under this clause of the Fourteenth Amendment, preeminently, call for the application of the settled rule that before one may be heard to oppose state legislation upon the ground of its repugnance to the Federal Constitution he must bring himself within the class affected by the alleged unconstitutional feature. *Rosenthal* v. *New York,* 226 U. S. 260, 270–271; *Jeffrey Manufacturing Co.* v. *Blagg,* 235 U. S. 571, 576; *Arkadelphia Milling Co.* v. *St. Louis Southwestern Ry. Co.,* 249 U. S. 134, 149; *Middleton* v. *Texas Power & Light Co.,* 249 U. S. 152, 156–157.

A disregard of the rule in the present case has resulted, as it seems to me, in treating as a discrimination what, so

far as plaintiffs are concerned, is no more than a failure to include in the statute a case which in consistency ought, it is said, to have been covered—an omission immaterial to plaintiffs. This is to transform the provision of the Fourteenth Amendment from a guaranty of the "protection of equal laws" into an insistence upon laws complete, perfect, symmetrical.

The guaranty of "equal protection" entitles plaintiffs to treatment not less favorable than that given to others similarly circumstanced. This the present statute gives them. The provision does not entitle them, as against their present opponents under present circumstances, to protection as adequate as they might have against opponents of another class under like circumstances. I find no authority for the proposition that the guaranty was intended to secure equality of protection "not only for all but against all similarly situated," except as between persons who properly belong in the same class. The familiar expression, in *Barbier* v. *Connolly*, 113 U. S. 27, 32, "Class legislation, discriminating against some and favoring others," refers to a discrimination which at the same time favors others similarly situated. The same is true of what was said in *Hayes* v. *Missouri*, 120 U. S. 68, 71–72, to the effect that the Amendment "merely requires that all persons subjected to such legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed." Other decisions are to the same effect. Nothing in the Arizona statute under consideration, either as written or as construed and applied, operates to discriminate against plaintiffs in favor of others similarly circumstanced and conditioned. Neither class of supposed offenders—those exempt from or those subject to injunction—stands in like case with plaintiffs who seek an injunction.

But, assuming plaintiffs were entitled to assert, as a denial of equal protection, the alleged discrimination aris-

ing from a denial of equitable relief in one class of cases which would be granted in another, I am unable to see that the statute creates an arbitrary and unreasonable discrimination in this regard.

It is going far—too far, I submit—to assume that there is any discrimination in fact. Such a campaign as that conducted by defendants, the legislature foresaw, was likely to be resorted to by employees or former employees, in the case of a dispute with the employer concerning terms or conditions of employment. In such a case, for reasons deemed sufficient, the legislature declared there should be no injunction. That such picketing or boycotting ever was conducted in Arizona, or that the legislature had reason to anticipate that it would be undertaken in the future, by competitors in business or any others than participants in a labor dispute, does not appear and cannot be assumed. Without this, the supposed discrimination is but theoretical, not practical.

But were there actual discrimination, granting immunity from injunction to laboring men who resort to unlawful conduct in the way of picketing, boycotting and the like, seriously interfering with the employer's business, while denying the like immunity to other classes who may resort to similar unlawful and harmful conduct but with what the legislature probably regarded as a slighter claim to indulgence, I cannot agree that this demonstrates the classification to be so arbitrary and unreasonable as to render the act a denial of the equal protection of the laws. Doubtless the legislature, upon a review of the subject in the light of a knowledge of conditions in their own State that we do not possess, concluded that in labor controversies there were reasons affecting the public interest for preventing resort to the process of injunction and leaving the parties to the ordinary legal remedies, which reasons did not apply generally. The simple truth is, they merely singled out, as properly they

might, a particular kind of controversy for what they regarded as appropriate treatment; and, as already shown, they acted upon it in a manner consistent with due process of law. There is here no denial of equal protection. Legislation almost of necessity proceeds subject by subject, with classification as an essential part of the process. In adjusting their laws to the needs of the people the States have a wide range of discretion about classification; the equal protection clause does not require that all state laws shall be perfect and complete, nor that the entire field of proper legislation shall be covered by a single act; and it is not a valid objection that a law made applicable to one subject might properly have been extended to others. *Rosenthal* v. *New York*, 226 U. S. 260, 270–271; *Missouri, Kansas & Texas Ry. Co.* v. *Cade*, 233 U. S. 642, 649–650. All employers' liability and workmen's compensation laws proceed upon the basis that the responsibility of employers for injuries sustained by employees forms a proper subject for separate treatment. See *Second Employers' Liability Cases*, 223 U. S. 1; *New York Central R. R. Co.* v. *White*, 243 U. S. 188; *Hawkins* v. *Bleakly*, 243 U. S. 210; *Mountain Timber Co.* v. *Washington*, 243 U. S. 219; *Middleton* v. *Texas Power & Light Co.*, 249 U. S. 152; *Arizona Employers' Liability Cases*, 250 U. S. 400. And I see no adequate reason for denying the authority of a State to deal separately with those controversies between employer and employees or between persons employed and those seeking employment, which experience has shown to be a characteristic outgrowth of disputes over the terms and conditions of employment.

I am unable to conclude that Paragraph 1464 either deprives plaintiffs in error of liberty or property without due process of law, or denies to them the equal protection of the laws, within the meaning of the Fourteenth Amendment.

MR. JUSTICE BRANDEIS, dissenting.

The first legislature of the State of Arizona adopted in 1913 a Civil Code. By Title 6, c. III, it sets forth conditions and circumstances under which the courts of the State may or may not grant injunctions. Paragraph 1464 contains, among other things, a prohibition against interfering by injunction between employers and employees, in any case growing out of a dispute concerning terms or conditions of employment, unless interposition by injunction is necessary to protect property from injury through violence. Its main purpose was doubtless to prohibit the courts from enjoining peaceful picketing and the boycott. With the wisdom of the statute we have no concern. Whether Arizona in enacting this statute transgressed limitations imposed upon the power of the States by the Fourteenth Amendment is the question presented for decision.

The employer has, of course, a legal right to carry on his business for profit; and incidentally the subsidiary rights to secure and retain customers, to fix such prices for his product as he deems proper, and to buy merchandise and labor at such prices as he chooses to pay. This right to carry on business—be it called liberty or property—has value; and, he who interferes with the right without cause renders himself liable. But for cause the right may be interfered with and even be destroyed. Such cause exists when, in the pursuit of an equal right to further their several interests, his competitors make inroads upon his trade, or when suppliers of merchandise or of labor make inroads upon his profits. What methods and means are permissible in this struggle of contending forces is determined in part by decisions of the courts, in part by acts of the legislatures. The rules governing the contest necessarily change from time to time. For conditions change; and, furthermore, the rules evolved, being merely experi-

ments in government, must be discarded when they prove to be failures.

Practically every change in the law governing the relation of employer and employee must abridge, in some respect, the liberty or property of one of the parties—if liberty and property be measured by the standard of the law theretofore prevailing. If such changes are made by acts of the legislature, we call the modification an exercise of the police power. And, although the change may involve interference with existing liberty or property of individuals, the statute will not be declared a violation of the due process clause, unless the court finds that the interference is arbitrary or unreasonable or that, considered as a means, the measure has no real or substantial relation of cause to a permissible end.[1] Nor will such changes in the law governing contests between employer and employee be held to be violative of the equal protection clause, merely because the liberty or property of individuals in other relations to each other (for instance, as competitors in trade or as vendor and purchaser) would not, under similar circumstances, be subject to like abridgement. Few laws are of universal application. It is of the nature of our law that it has dealt not with man in general, but with him in relationships. That a peculiar relationship of individuals may furnish legal basis for the classification which satisfies the requirement of the Fourteenth Amendment[2] is clear. That the relation of em-

[1] *Muller* v. *Oregon*, 208 U. S. 412; *Dominion Hotel* v. *Arizona*, 249 U. S. 265.

[2] "The rule, therefore, is not a substitute for municipal law; it only prescribes that that law have the attribute of equality of operation, and equality of operation does not mean indiscriminate operation on persons merely as such, but on persons according to their relations." Mr. Justice McKenna in *Magoun* v. *Illinois Trust & Savings Bank*, 170 U. S. 283, 293.

In *Fidelity Mutual Life Association* v. *Mettler*, 185 U. S. 308, and *Northwestern National Life Insurance Co.* v. *Riggs*, 203 U. S. 243,

ployer and employee affords a constitutional basis for legislation applicable only to persons standing in that relation has been repeatedly held by this court.[3] The questions submitted are whether this statutory prohibition of the remedy by injunction is in itself arbitrary and so unreasonable as to deprive the employer of liberty or property without due process of law;—and whether limitation of this prohibition to controversies involving employment denies him equal protection of the laws.

Whether a law enacted in the exercise of the police power is justly subject to the charge of being unreasonable or arbitrary, can ordinarily be determined only by a consideration of the contemporary conditions, social, industrial and political, of the community to be affected thereby. Resort to such facts is necessary, among other things, in order to appreciate the evils sought to be

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the relation of insurer and insured was made the subject of regulation; in *Western Union Telegraph Co.* v. *Commercial Milling Co.*, 218 U. S. 406; *Seaboard Air Line Ry.* v. *Seegers*, 207 U. S. 73; *Yazoo & Mississippi Valley R. R. Co.* v. *Jackson Vinegar Co.*, 226 U. S. 217, that of public utility and patron; in *Noble State Bank* v. *Haskell*, 219 U. S. 104, that of banker and depositor; in *St. Louis & San Francisco Ry. Co.* v. *Mathews*, 165 U. S. 1; *Missouri, Kansas & Texas Ry. Co.* v. *May*, 194 U. S. 267; and *Minneapolis & St. Louis Ry. Co.* v. *Emmons*, 149 U. S. 364, that of railway and adjoining landowner.

[3] *Holden* v. *Hardy*, 169 U. S. 366; *St. Louis, Iron Mountain & St. Paul Ry. Co.* v. *Paul*, 173 U. S. 404; *Tullis* v. *Lake Erie & Western R. R. Co.*, 175 U. S. 348; *Knoxville Iron Co.* v. *Harbison*, 183 U. S. 13; *Atkin* v. *Kansas*, 191 U. S. 207; *Great Southern Hotel Co.* v. *Jones*, 193 U. S. 532; *Minnesota Iron Co.* v. *Kline*, 199 U. S. 593; *Wilmington Star Mining Co.* v. *Fulton*, 205 U. S. 60; *Muller* v. *Oregon*, 208 U. S. 412; *McLean* v. *Arkansas*, 211 U. S. 539; *Louisville & Nashville R. R. Co.* v. *Melton*, 218 U. S. 36; *Mobile, Jackson & Kansas City R. R. Co.* v. *Turnipseed*, 219 U. S. 35; *Chicago, Rock Island & Pacific Ry. Co.* v. *Arkansas*, 219 U. S. 453; *Arizona Employers' Liability Cases*, 250 U. S. 400. Compare *Second Employers' Liability Cases*, 223 U. S. 1.

remedied and the possible effects of the remedy proposed. Nearly all legislation involves a weighing of public needs as against private desires; and likewise a weighing of relative social values. Since government is not an exact science, prevailing public opinion concerning the evils and the remedy is among the important facts deserving consideration; particularly, when the public conviction is both deep-seated and widespread and has been reached after deliberation.[4] What, at any particular time, is the paramount public need is, necessarily, largely a matter of judgment. Hence, in passing upon the validity of a law challenged as being unreasonable, aid may be derived from the experience of other countries and of the several States of our Union in which the common law and [illegible] tions of liberty and of property prevail. The history of the rules governing contests between employer and employed in the several English-speaking countries illustrates both the susceptibility of such rules to change and the variety of contemporary opinion as to what rules will best serve the public interest. The divergence of opinion in this difficult field of governmental action should admonish us not to declare a rule arbitrary and unreasonable merely because we are convinced that it is fraught with danger to the public weal, and thus to close the door to experiment within the law.

In England a workingman struggling to improve his condition, even when acting singly, was confronted until 1813 with laws limiting the amount of wages which he might demand.[5] Until 1824 he was punishable as a criminal if he combined with his fellow workmen to raise wages or shorten hours or to affect the business in any

[4] *Muller* v. *Oregon*, 208 U. S. 412, 420.

[5] 53 Geo. 3, c. 40. For the earlier law see, for instance, 23 Edw. 3, c. 1–8; 25 Edw. 3, c. 1–7, The Statutes of Laborers; 5 Eliz., c. 4; 1 Jac. 1, c. 6.

way, even if there was no resort to a strike.[6] Until 1871 members of a union who joined in persuading employees to leave work were liable criminally, although the employees were not under contract and the persuasion was both peaceful and unattended by picketing.[7] Until 1871 threatening a strike, whatever the cause, was also a criminal act.[8] Not until 1875 was the right of workers to combine in order to attain their ends conceded fully. In that year Parliament declared that workmen combining in furtherance of a trade dispute should not be indictable for criminal conspiracy unless the act if done by one person would be indictable as a crime.[9] After that statute a combination of workmen to effect the ordinary objects of a strike was no longer a criminal offense. But picketing, though peaceful, in aid of a strike, remained illegal;[10] and likewise the boycott.[11] Not until 1906 was the ban on

[6] 5 Geo. 4, c. 95, (replaced by 6 Geo. 4, c. 129). For the earlier law see, for instance, 34 Edw. 3, c. 9; *The King* v. *Journeymen Tailors of Cambridge*, 8 Modern, 10; Wright, The Law of Criminal Conspiracies.

[7] Criminal Law Amendment Act (1871), 34 & 35 Vic., c. 32, § 1, last paragraph. For the earlier law see *Regina* v. *Rowlands*, 2 Den. 363.

[8] Criminal Law Amendment Act (1871), 34 & 35 Vic., c. 32, § 1, sub-sec. 2. For the earlier law see *Walsby* v. *Anley*, 3 E. & E. 516; *Skinner* v. *Kitch*, 10 Cox C. C. 493; L. R. 2 Q. B. 393 (1867).

[9] The Conspiracy and Protection of Property Act (1875), 38 & 39 Vic., c. 86, § 3. But see *Rigby* v. *Connol*, L. R. 14 Ch. D. 482, 491.

[10] 38 & 39 Vic., c. 86, § 7; *Regina* v. *Bauld*, 13 Cox C. C. 282; *Lyons* v. *Wilkins*, [1896] 1 Ch. 811, 826, 831; [1899] 1 Ch. 255; *Taff Vale Ry. Co.* v. *Amalgamated Society of Railway Servants*, [1901] A. C. 426.

[11] *Temperton* v. *Russell* [1893] 1 Q. B. 715; *Quinn* v. *Leathem*, [1901] A. C. 495. But compare with these cases *Boots* v. *Grundy*, 82 L. T. R. 769; *Scottish Co-operative Society* v. *Glasgow Fleshers*, 35 Scottish L. R. 645; *Bulcock* v. *St. Anne's Master Builders' Federation*, 19 T. L. R. 27; a distinction between these and the two former is pointed out in *Quinn* v. *Leathem*, *supra*, p. 539. The Royal Com-

peaceful picketing and the bringing of pressure upon an employer by means of a secondary strike or a boycott removed.[12] In 1906, also, the act of inducing workers to break their contract of employment (previously held an actionable wrong)[13] was expressly declared legal.[14] In England improvement of the condition of workingmen

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mission on Trade Disputes and Trade Combinations, whose recommendations were the basis of the Trade Disputes Act, 1906, 6 Edw. 7, c. 47, recommended, Report, p. 16, "that an act should be passed for the following objects:— . . . (2) To declare strikes from whatever motive or for whatever purposes (including sympathetic or secondary strikes), apart from crime or breach of contract, legal . . ." It is probable that §§ 1 and 3 of the Act of 1906 make the secondary strike or boycott in the course of a trade dispute legal. But see note 14, par. 2.

[12] The Trade Disputes Act (1906), 6 Edw. 7, c. 47, § 2.

[13] *Read* v. *Friendly Society of Stonemasons*, [1902] 2 K. B. 88; *id.*, 732; *South Wales Miners' Federation* v. *Glamorgan Coal Co.*, [1905] A. C. 239.

[14] 6 Edw. 7, c. 47, § 3, "An act done by a person in contemplation or furtherance of a trade dispute shall not be actionable on the ground only that it induces some other person to break a contract of employment or that it is an interference with the trade, business, or employment of some other person, or with the right of some other person to dispose of his capital or his labour as he wills." But the employee who breaks his contract remains personally liable in damages.

The law of England still prohibits certain practices which might prove effective in the struggle between employer and employee. Thus the Trade Disputes Act, *supra*, does not sanction some threats or coercion, *Conway* v. *Wade*, [1909] A. C. 506, 511. It does not permit a strike to force the discharge of a member of the union who has not paid a fine, *Conway* v. *Wade*, *supra*. Nor does it permit inducing an employer's men to break their contracts in order to force him to join an employers' association, since this is not a trade dispute within the meaning of the act, *Larkin* v. *Long*, [1915] A. C. 814. The judges are by no means agreed as to what constitutes coercion. Compare: *Hodges* v. *Webb*, [1920] 2 Ch. 70; *Valentine* v. *Hyde*, [1919] 2 Ch. 129; *Pratt* v. *British Medical Association*, [1919] 1 K. B. 244; and *Davies v. Thomas*, [1920] 1 Ch. 217.

and their emancipation appear to have been deemed recently the paramount public need.

In the British Dominions the rules governing the struggle between employer and employed were likewise subjected to many modifications; but the trend of social experiment took a direction very different from that followed in the mother country. Instead of enabling the worker to pursue such methods as he might deem effective in the contest, statutes were enacted in some of the Dominions which forbade the boycott, peaceful picketing, and even the simple strike and the lockout;[15] use of the injunction to enforce compliance with these prohibitions was expressly sanctioned;[16] and violation of the statute

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[15] Australia: Commonwealth Conciliation and Arbitration Act, 1904–15, §§ 6–9; New South Wales, Industrial Arbitration Act, 1912–1918, §§ 48D and 48E; compare Queensland, Industrial Arbitration Act, 1916, § 65. New Zealand: Industrial Conciliation and Arbitration Act, 1908, § 108; Industrial Conciliation and Arbitration Amendment Act, 1908, Part I.

[16] The Industrial Disputes Act of New South Wales, 1908, § 60, made strikes and lockouts illegal and the Industrial Arbitration Act, 1912, which replaced it, continued their illegality, §§ 44–48, and expressly provided that they might be enjoined by the Court of Industrial Arbitration; but by the Act of 1918, § 15, §§ 45 to 48 inclusive of the earlier act, dealing with strikes, were amended:

"45. The following strikes and no others shall be illegal:—

"(a) Any strike by employees of the crown, etc.

"(b) Any strike by the employees in an industry the conditions of which are for the time being wholly or partially regulated by an award or by an industrial agreement: etc.

"(c) Any strike which has been commenced prior to the expiry of fourteen clear days notice in writing of intention to commence the same or of the existence of such conditions as would be likely to lead to the same given the Minister, etc.

"46. In the event of an illegal strike occurring in any industry, the court may order any trade union, whose executive or members are taking part in or aiding or abetting the strike, to pay a penalty not exceeding five hundred pounds."

The Commonwealth Conciliation and Arbitration Act, 1904, § 38(e), provides that the Court of Arbitration and Conciliation

was also made punishable by criminal proceedings.[17] These prohibitions were the concomitants of prescribed industrial arbitration through administrative tribunals by which the right of both employer and employee to liberty and property were seriously abridged in the public interest. Australia [18] and New Zealand [19] made compulsory both arbitration and compliance with the award.[20] Canada limited the compulsion to a postponement of the right to strike until the dispute should have been officially investigated and reported upon.[21] In these Dominions the uninterrupted pursuit of industry and the prevention of the arbitrary use of power appear to be deemed the paramount public needs.

In the United States the rules of the common law governing the struggle between employer and employee have likewise been subjected to modifications. These have

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shall have power "to enjoin any organization or person from committing or continuing any contravention of this Act."

[17] See note 15, *supra*.

[18] The Commonwealth Conciliation and Arbitration Act, 1904–1915, §§ 19–31. (Printed as Appendix A to Commonwealth Acts 1914–1915.) See Henry B. Higgins, "A New Province for Law and Order," 29 Harv. Law Rev. 13; 32 Harv. Law Rev. 189; 34 Harv. Law Rev. 105.

[19] Industrial Conciliation and Arbitration Act, 1908, *supra*, §§ 53–104, as amended by Acts 1908, No. 239, Part II; Acts 1911, No. 33; Acts 1913, No. 7.

[20] Compare Kansas act creating a court of industrial relations, Laws 1920, c. 29. *State* v. *Howat*, 107 Kan. 423; *State* v. *Howat*, 109 Kan. 376; *Court of Industrial Relations* v. *Charles Wolff Packing Co.*, 109 Kan. 629.

[21] Industrial Disputes Investigation Act, 1907, 6–7 Edw. 7, c. 20, §§ 56, 57. *Rex* v. *McGuire*, 16 O. L. R. 522. 9–10 Edw. 7, c. 29. 8–9 Geo. 5, c. 27. 10–11 Geo. 5, c. 29.

Picketing is illegal. Criminal Code, Canada, § 501; *Krug Furniture Co.* v. *Union of Woodworkers*, 5 O. L. R. 463; *Cotter* v. *Osborne*, 18 Man. 471; *Vulcan Iron Works* v. *Winnipeg Lodge*, 21 Man. 473; *Le Roi Mining Co.* v. *Rossland Miners Union*, 8 B. C. 370. But see Rev. Stats., B. C., c. 228.

been made mainly through judicial decisions. The legal right of workingmen to combine and to strike in order to secure for themselves higher wages, shorter hours and better working conditions received early general recognition.[22] But there developed great diversity of opinion as to the means by which,[23] and also as to the persons through whom,[24] and upon whom [25] pressure might permissibly be

[22] *Commonwealth* v. *Hunt*, 4 Met. 111; for earlier common law and statutory provisions see *Carew* v. *Rutherford*, 106 Mass. 1, 14; 1 Weeden, Economic and Social History of New England, pp. 173, 334. Freund, Police Power, § 331; Commons, History of Labor in the United States, vol. 1, c. 5.

[23] For the boycott see note 28, *infra*, p. 364; and for peaceful picketing, note 29, *infra*, p. 365.

In some jurisdictions the strike was considered an unlawful means of procuring the unionization of the shop,—see *Plant* v. *Woods*, 176 Mass. 492; *Pickett* v. *Walsh*, 192 Mass. 572, 585; *Lucke* v. *Clothing Cutters' Assembly*, 77 Md. 396; *Erdman* v. *Mitchell*, 207 Pa. St. 79; Freund, Police Power, § 331;—while in others it was regarded as permissible,—*National Protective Association* v. *Cumming*, 170 N. Y. 315; *Kemp* v. *Division No. 241*, 255 Ill. 213; *Grant Construction Co.* v. *St. Paul Building Trades Council*, 136 Minn. 167; *State* v. *Van Pelt*, 136 N. Car. 633; *Jetton-Dekle Lumber Co.* v. *Mather*, 53 Fla. 969; *Cohn & Roth Electric Co.* v. *Bricklayers Union*, 92 Conn. 161.

[24] In some jurisdictions the officers of the national union, not being employees, are regarded as outsiders with no justification for their acts,—*Booth* v. *Burgess*, 72 N. J. Eq. 181; *Jones Glass Co.* v. *Glass Bottle Blowers' Association*, 72 N. J. Eq. 653; 77 N. J. Eq. 219. In other jurisdictions it is held that they are furthering a legitimate interest,—see *Allen* v. *Flood*, [1898] A. C. 1; *Jose* v. *Metallic Roofing Co.*, [1908] A. C. 514, reversing 14 O. L. R. 156; *Gill Engraving Co.* v. *Doerr*, 214 Fed. 111; *Lindsay & Co.* v. *Montana Federation of Labor*, 37 Mont. 264. See *American Steel Foundries* v. *Tri-City Central Trades Council*, *ante*, 184.

[25] In some jurisdictions the courts seek to localize the conflict by making it illegal to bring in any party beyond those between whom the original dispute arose,—*Burnham* v. *Dowd*, 217 Mass. 351; *Booth* v. *Burgess*, 72 N. J. Eq. 181; *Purvis* v. *United Brotherhood*, 214 Pa. St. 348;—in other jurisdictions it is considered that anyone having business relations with either party which bear on the matter in con-

exerted in order to induce the employer to yield to the demands of the workingmen. Courts were required, in the absence of legislation, to determine what the public welfare demanded;—whether it would not be best subserved by leaving the contestants free to resort to any means not involving a breach of the peace or injury to tangible property; whether it was consistent with the public interest that the contestants should be permitted to invoke the aid of others not directly interested in the matter in controversy; and to what extent incidental injury to persons not parties to the controversy should be held justifiable.

The earliest reported American decision on peaceful picketing appears to have been rendered in 1888 [26]; the earliest on boycotting in 1886.[27] By no great majority the prevailing judicial opinion in America declares the boy-

troversy has violated his neutrality and is subject to reprisal from the union which is carrying on the struggle,—*Bossert* v. *Dhuy*, 221 N. Y. 342; *Master Builders' Association* v. *Domascio*, 16 Colo. App. 25; *Pierce* v. *Stablemen's Union*, 156 Cal. 70, 76; *Cohn & Roth Electric Co.* v. *Bricklayers Union*, 92 Conn. 161; *Gill Engraving Co.* v. *Doerr*, 214 Fed. 111; *Grant Construction Co.* v. *St. Paul Building Trades Council*, 136 Minn. 167. See 31 Harv. Law Rev. 482, and *Auburn Draying Co.* v. *Wardell*, 227 N. Y. 1, for limitations.

Again, in some States it is unlawful to resort to the method of notifying persons that a strike will occur if a non-union employer or his product is employed,—*Booth* v. *Burgess*, 72 N. J. Eq. 181; *Gray* v. *Building Trades Council*, 91 Minn. 171;—while in other States it is lawful,—*Cohn & Roth Electric Co.* v. *Bricklayers Union*, 92 Conn. 161, 167; *Bossert* v. *Dhuy*, 221 N. Y. 342.

[26] *Sherry* v. *Perkins*, 147 Mass. 212; but the doctrine was not established until eight years later, *Vegelahn* v. *Guntner*, 167 Mass. 92.

[27] The earliest reported cases seem to be *People* v. *Wilzig*, 4 N. Y. Crim. 403; and *People* v. *Kostka*, 4 N. Y. Crim. 429, both of which occurred in June, 1886; the leading case of *State* v. *Glidden*, 55 Conn. 46, came the next year. Laidler, however, speaks of an unreported case in 1840; see Laidler, Boycotts and the Labor Struggle, p. 70; see also Commons, History of Labor in the United States, vol. 2, pp. 267, 317, 364.

cott as commonly practiced an illegal means [28] (see *Duplex Printing Press Co.* v. *Deering*, 254 U. S. 443), while it in-

[28] Some of the difference of opinion results from a difference in definition. A boycott is sometimes defined so as to entail violence or malicious oppression, *State* v. *Glidden*, 55 Conn. 46; while in other cases it is simply pressure exerted by abstention from business relations, *Mills* v. *United States Printing Co.*, 99 App. Div. 605, affd. 199 N. Y. 76. The terms primary and secondary as describing the boycott are also of uncertain content. Only a boycott that is free of violence or malevolence is anywhere held to be lawful. This peaceful boycott in support of a *bona fide* industrial conflict, however, is not everywhere held lawful, and its lawfulness often is held to depend on whether it is used against the industrial antagonist directly (primary boycott) or against an outsider because of his influence on or connection with the industrial antagonist (secondary boycott). Holding the boycott, primary and secondary, illegal: *Wilson* v. *Hey*, 232 Ill. 389; *Beck* v. *Railway Teamsters' Union*, 118 Mich. 497; *Gray* v. *Building Trades Council*, 91 Minn. 171; *Booth* v. *Burgess*, 72 N. J. Eq. 181; *Purvis* v. *United Brotherhood*, 214 Pa. St. 348; *Patch Manufacturing Co.* v. *Protection Lodge*, 77 Vt. 294; *State* v. *Glidden*, 55 Conn. 46; *Crump* v. *Commonwealth*, 84 Va. 927, 939; *Jensen* v. *Cooks', etc. Union*, 39 Wash. 531; *Webb* v. *Cooks', etc. Union*, 205 S. W. (Tex.) 465; *Seubert* v. *Reiff*, 164 N. Y. S. 522; *American Federation of Labor* v. *Buck's Stove & Range Co.*, 33 App. D. C. 83; *Burnham* v. *Dowd*, 217 Mass. 351; *My Maryland Lodge* v. *Adt*, 100 Md. 238.

Holding primary boycott legal: *Foster* v. *Retail Clerks' Association*, 78 N. Y. S. 860, 867; *Butterick Publishing Co.* v. *Typographical Union*, 100 N. Y. S. 292; *Gill Engraving Co.* v. *Doerr*, 214 Fed. 111; *Empire Theatre Co.* v. *Cloke*, 53 Mont. 183; *Steffes* v. *Motion Picture Union*, 136 Minn. 200; *Stoner* v. *Robert*, 43 Wash. (D. C.) L. Rep. 437; *Guethler* v. *Altman*, 26 Ind. App. 587; *Pierce* v. *Stablemen's Union*, 156 Cal. 70; *Riggs* v. *Cincinnati Waiters*, 5 Ohio Nisi Prius, 386; *McCormick* v. *Local Union*, 13 Ohio Cir. Ct. (N. S.) 545; *Ex parte Sweitzer*, 13 Okl. Cr. 154. See Laws of Utah, 1917, c. 68; *Root* v. *Anderson*, 207 S. W. (Mo.) 255.

Holding secondary boycott legal: *Bossert* v. *Dhuy*, 221 N. Y. 342–though compare *Auburn Draying Co.* v. *Wardell*, 227 N. Y. 1; *Stoner* v. *Robert*, 43 Wash. (D. C.) L. Rep. 437; *Lindsay & Co.* v. *Montana Federation of Labor*, 37 Mont. 264; *Pierce* v. *Stablemen's Union*, 156 Cal. 70, 76; *Parkinson Co.* v. *Building Trades Council*, 154 Cal. 581; see *Marx & Haas Jeans Clothing Co.* v. *Watson*, 168 Mo. 133.

clines towards the legality of peaceful picketing.[29] See *American Steel Foundries* v. *Tri-City Central Trades Council, ante*, 184. But in some of the States, notably New York, both peaceful picketing and the boycott are declared permissible.[30] Judges, being thus called upon to exercise a quasi-legislative function and weigh relative social values, naturally differed in their conclusions on such questions.[31]

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[29] Holding picketing in itself illegal:—*Vegelahn* v. *Guntner*, 167 Mass. 92; *Pierce* v. *Stablemen's Union*, 156 Cal. 70; *Barnes & Co.* v. *Chicago Typographical Union*, 232 Ill. 424; *Lyon & Healy* v. *Piano, etc. Workers' Union*, 289 Ill. 176; *Beck* v. *Railway Teamsters' Union*, 118 Mich. 497; *Clarage* v. *Luphringer*, 202 Mich. 612; *Baldwin Lumber Co.* v. *Brotherhood of Teamsters, etc.*, 91 N. J. Eq. 240; *Baasch* v. *Cooks Union*, 99 Wash. 378; *Webb* v. *Cooks', etc., Union*, 205 S. W. (Tex.) 465; the Washington Act, 1915, c. 181, declaring picketing to be unlawful, was defeated on referendum in 1916; *Atchison, Topeka & Santa Fe Ry. Co.* v. *Gee*, 139 Fed. 582.

Stating that peaceful picketing is lawful:—*Riggs* v. *Cincinnati Waiters*, 5 Ohio Nisi Prius, 386; *McCormick* v. *Local Union*, 13 Ohio Cir. Ct. (N. S.) 545; *Jones* v. *Van Winkle Machine Works*, 131 Ga. 336, 340; *Karges Furniture Co.* v. *Amalgamated, etc., Union*, 165 Ind. 421, 430, 431; *Everett Waddey Co.* v. *Richmond Typographical Union*, 105 Va. 188, 197; *Steffes* v. *Motion Picture Union*, 136 Minn. 200,—see also Laws 1917, c. 493; *Stoner* v. *Robert*, 43 Wash. (D. C.) L. Rep. 437; *Empire Theatre Co.* v. *Cloke*, 53 Mont. 183; *Mills* v. *United States Printing Co.*, 99 App. Div. 605, affd. 199 N. Y. 76; *Ex parte Sweitzer*, 13 Okl. Cr. 154; *White Mountain Freezer Co.* v. *Murphy*, 78 N. H. 398; see Utah, Laws of 1917, c. 68; *American Engineering Co.* v. *International Moulders Union*, 25 Pa. Dist. 564; *Iron Molders' Union* v. *Allis-Chalmers Co.*, 166 Fed. 45; *St. Louis* v. *Gloner*, 210 Mo. 502.

[30] *Mills* v. *United States Printing Co.*, 99 App. Div. 605, affd. 199 N. Y. 76; see also cases in note 29, *supra*, from Ohio, Minnesota, Montana, and Oklahoma.

[31] Compare:—*Plant* v. *Woods*, 176 Mass. 492, 502, last paragraph, with *Cohn & Roth Electric Co.* v. *Bricklayers Union*, 92 Conn. 161, 167, and, *Bossert* v. *Dhuy*, 221 N. Y. 342, 359. See Geldart, The Present Law of Trade Unions and Trade Disputes, p. 24; Hoxie, Trade Unionism in the United States, p. 231; "Strikes and Boycotts", 34 Harv. Law Rev. 880.

In England, observance of the rules of the contest has been enforced by the courts almost wholly through the criminal law or through actions at law for compensation. An injunction was granted in a labor dispute as early as 1868.[32] But in England resort to the injunction has not been frequent and it has played no appreciable part there in the conflict between capital and labor. In America the injunction did not secure recognition as a possible remedy until 1888.[33] When a few years later its use became extensive and conspicuous, the controversy over the remedy overshadowed in bitterness the question of the relative substantive rights of the parties. In the storms of protest against this use many thoughtful lawyers joined.[34] The equitable remedy, although applied in accordance with established practice, involved incidents which, it was asserted, endangered the personal liberty of wage-earners. The acts enjoined were frequently, perhaps usually, acts which were already crimes at common law or had been made so by statutes. The issues in litigation arising out of trade disputes related largely to questions of fact. But in equity issues of fact as of law were tried by a single judge, sitting without a jury. Charges of violating an

[32] *Springhead Spinning Co.* v. *Riley*, L. R. 6 Eq. 551.

[33] The earliest case of importance was *Sherry* v. *Perkins*, 147 Mass. 212 (1888). But injunctions were granted four or five years earlier. Commons, History of Labor in the United States, vol. 2, p. 504.

[34] "Government by Injunction" by W. H. Dunbar, 13 Law Quarterly Review, 347; "Government by Injunction", by Charles Noble Gregory, 11 Harv. Law Rev. 487; "Injunction and Organized Labor", by Charles C. Allen, 28 Am. Law Rev. 828; "The Modern Use of Injunctions", by F. J. Stimson, 10 Pol. Sci. Quarterly, 189; "Strikes and Courts of Equity", by William Draper Lewis, 46 Am. Law Reg. 1; "Government by Injunction", by Percy L. Edwards, 57 Albany Law Journal, 8; "The Abuses of Injunction", by Samuel Seabury, 29 Arena, 561; "Government by Injunction", by Cornelius H. Fauntleroy, 69 Cent. Law Journal, 129; "Government by Injunction", by Thomas F. Hargis, 4 Amer. Fed. 227. See Report of U. S. Industrial Commission (1901) vol. XVII, p. 611.

injunction were often heard on affidavits merely, without the opportunity of confronting or cross-examining witnesses.[35] Men found guilty of contempt were committed in the judge's discretion, without either a statutory limit upon the length of the imprisonment, or the opportunity of effective review on appeal, or the right to release on bail pending possible revisory proceedings.[36] The effect of the proceeding upon the individual was substantially the same as if he had been successfully prosecuted for a crime; but he was denied, in the course of the equity proceedings, those rights which by the Constitution are commonly secured to persons charged with a crime.

It was asserted that in these proceedings an alleged danger to property, always incidental and at times insignificant, was often laid hold of to enable the penalties of the criminal law to be enforced expeditiously without that protection to the liberty of the individual which the Bill of Rights was designed to afford; that through such proceedings a single judge often usurped the functions not only of the jury but of the police department; that, in prescribing the conditions under which strikes were per-

[35] In *Long* v. *Bricklayers, etc. Union*, 17 Pa. Dist. 984, the judge prefaced his opinion as follows, "Hardly anything of greater private or public gravity is ever presented to the court, and yet these matters are constantly receiving adjudication without a single witness brought before the judge. It is a bad practice. I confess my inability to determine with any satisfaction from an inspection of inanimate manuscript, questions of veracity. In disposing of the present rule, I am compelled to find, as best I may from perusing two hundred and thirty-five lifeless typewritten pages of conflicting evidence, the facts which must determine respondent's guilt or innocence on the quasi-criminal charge of contempt."

[36] *Hake* v. *People*, 230 Ill. 174, 196, discretion of judge; *Tinsley* v. *Anderson*, 171 U. S. 101, 107–108, unlimited commitment; *State* v. *Erickson*, 66 Wash. 639, 641; *State v. Chouteau County Court*, 51 Mont. 337, 342; *Scoric* v. *United States*, 217 Fed. 871, scope of review; *People* v. *Tefft*, 3 Cow. (N. Y.) 340, *Matter of Vanderbilt*, 4 Johns. Ch. (N. Y.) 57, admission to bail within discretion of judge.

missible and how they might be carried out, he usurped also the powers of the legislature; and that incidentally he abridged the constitutional rights of individuals to free speech, to a free press and to peaceful assembly.

It was urged that the real motive in seeking the injunction was not ordinarily to prevent property from being injured nor to protect the owner in its use, but to endow property with active, militant power which would make it dominant over men. In other words, that, under the guise of protecting property rights, the employer was seeking sovereign power. And many disinterested men, solicitous only for the public welfare, believed that the law of property was not appropriate for dealing with the forces beneath social unrest; that in this vast struggle it was unwise to throw the power of the State on one side or the other according to principles deduced from that law; that the problem of the control and conduct of industry demanded a solution of its own; and that, pending the ascertainment of new principles to govern industry, it was wiser for the State not to interfere in industrial struggles by the issuance of an injunction.[37]

After the constitutionality and the propriety of the use of the injunction in labor disputes was established judicially, those who opposed the practice sought the aid of Congress and of state legislatures. The bills introduced varied in character and in scope. Many dealt merely with rights; and, of these, some declared, in effect, that no act done in furtherance of a labor dispute by a combination of workingmen should be held illegal, unless it would

[37] See Final Report of the (U. S.) Industrial Commission (1902); Final Report of the (U. S.) Commission on Industrial Relations (1915), (Sen. Doc. 415, 64th Cong., 1st sess.), vol. 1, pp. 52–53, 90–92, vol. 11, testimony of Mr. Gilbert E. Roe, p. 10477; testimony of Mr. Arthur Woods, p. 10550; testimony of Dr. Frank Goodnow, p. 10599. American Federationist, vol. 7, p. 350; vol. 9, p. 685; vol. 15, p. 976.

have been so if done by a single individual; while others purported to legalize specific practices, like boycotting or picketing. Other bills dealt merely with the remedy; and of these, some undertook practically to abolish the use of the injunction in labor disputes, while some merely limited its use either by prohibiting its issue under certain conditions or by denying power to restrain certain acts. Some bills undertook to modify both rights and remedies.[38] These legislative proposals occupied the attention of Congress during every session but one in the twenty years between 1894 and 1914.[39] Reports recommending such legis-

[38] 53rd Congress: S. 1563, S. 1898, S. 2253, H. R. 7362, H. R. 7363; 54th Congress: S. 237, S. 1750, S. 2984, H. R. 319; 56th Congress: S. 4233, H. R. 8917; 57th Congress: S. 1118, S. 4553, H. R. 9678, H. R. 11060; 58th Congress: H. R. 89, H. R. 1234, H. R. 4063, H. R. 6782, H. R. 8136, H. R. 18327; 59th Congress: S. 2829, H. R. 4445, H. R. 9328, H. R. 17976, H. R. 18171, H. R. 18446, H. R. 18752; 60th Congress: S. 4533, S. 4727, S. 5888, H. R. 69, H. R. 94, H. R. 17137, H. R. 21358, H. R. 21359, H. R. 21454, H. R. 21489, H. R. 21539, H. R. 21629, H. R. 21991, H. R. 22010, H. R. 22032, H. R. 22298, H. R. 26300, H. R. 24781, H. R. 36609; 61st Congress: S. 3291, S. 4481, H. R. 3058, H. R. 9766, H. R. 10890, H. R. 16026, H. R. 18410, H. R. 20486, H. R. 20680, H. R. 20827, H. R. 21334, H. R. 22566; 62nd Congress: S. 6266, H. R. 4015, H. R. 4651, H. R. 5328, H. R. 5606, H. R. 9435, H. R. 11032, H. R. 23189, H. R. 21486, H. R. 21595, H. R. 22208, H. R. 22349, H. R. 22354, H. R. 22355, H. R. 23635; 63rd Congress: S. 927, H. R. 1873, H. R. 4659, H. R. 5484, H. R. 15657—which became the Clayton Act.

[39] See note 38, *supra*. Also 53rd Congress: resolutions to investigate the use of the injunction in certain cases, 26 Cong. Rec. 2466; 56th Congress: debate, 34 Cong. Rec. 2589; 60th Congress: hearings, Sen. Doc. 525; special message of the President, Sen. Doc. 213, 42 Cong. Rec. 1347; papers relating to injunctions in labor cases, Sen. Docs. 504 and 524; 61st Congress: debate, 45 Cong. Rec. 343; 62nd Congress: debate, 48 Cong. Rec. 6415–6470; hearings, Sen. Doc. 944; petitions, Sen. Doc. 440; hearings before the House Committee on the Judiciary, Jan. 11, 17–19, February 8, 14, 1912; hearings before a subcommittee of Senate Committee on the Judiciary, 62nd Congress, 2nd sess.; 63rd Congress, see debates on H. R. 15657 (the Clayton Act).

lation were repeatedly made by the Judiciary Committee of the House or that of the Senate; and at some sessions by both.[40] Prior to 1914, legislation of this character had at several sessions passed the House;[41] and in that year Congress passed and the President approved the Clayton Act, § 20 of which is substantially the same as Paragraph 1464 of the Arizona Civil Code. Act of October 15, 1914, c. 323, 38 Stat. 730, 738.

Such was the diversity of view concerning peaceful picketing and the boycott expressed in judicial decisions and legislation in English-speaking countries when in 1913 the new State of Arizona, in establishing its judicial system, limited the use of the injunction and when in 1918 its Supreme Court was called upon to declare for the first time the law of Arizona on these subjects. The case of *Truax* v. *Bisbee Local No. 380*, 19 Ariz. 379, presented facts identical with those of the case at bar.[42] In that case the Supreme Court made its decision on four controverted points of law. In the first place, it held that the officials of the union were not outsiders with no justification for their acts (19 Ariz. 379, 390).[43] In the second place, rejecting the view held by the federal courts and the majority of the state courts on the illegality of the boycott, it

[40] 54th Congress, House Report No. 2471; 56th Congress, House Report No. 1987, 2007; 57th Congress, Senate Report No. 1650, House Report No. 1522; 62nd Congress, House Report No. 612; 63rd Congress, Senate Report No. 698, House Report No. 627, Conference Report, Senate Document 585.

[41] In the 57th Congress, H. R. 11060 passed the House, 35 Cong. Rec. 4995. In the 62nd Congress, H. R. 23635 passed the House, 48 Cong. Rec. 6470, 6471.

[42] In this case the Supreme Court of Arizona said: "This action is founded upon the identical facts upon which the case of *Truax* v. *Bisbee Local No. 380*, 19 Ariz. 379, was founded . . . The questions presented in this record were necessarily decided by this court in the former hearing of the matter." *Truax* v. *Corrigan*, 20 Ariz. 7, 8.

[43] See note 24, p. 362, *supra*.

specifically accepted the law of New York, Montana and California, citing the decisions of those States (19 Ariz. 379, 388, 390).[44] In the third place, it rejected the law of New Jersey, Minnesota and Pennsylvania that it is illegal to circularize an employer's customers, and again adopted the rule declared in the decisions of the courts of New York, Montana, California and Connecticut (19 Ariz. 379, 389).[45] In deciding these three points the Supreme Court of Arizona made a choice between well-established precedents laid down on either side by some of the strongest courts in the country. Can this court say that thereby it deprived the plaintiff of his property without due process of law?

The fourth question requiring decision was whether peaceful picketing should be deemed legal. Here, too, each of the opposing views had the support of decisions of strong courts.[46] If the Arizona court had decided that by the common law of the State the defendants might peacefully picket the plaintiffs, its decision, like those of the courts of Ohio, Minnesota, Montana, New York, Oklahoma and New Hampshire, would surely not have been open to objection under the Federal Constitution; for this court has recently held that peaceful picketing is not unlawful. *American Steel Foundries* v. *Tri-City Central Trades Council, supra.* The Supreme Court of Arizona found it unnecessary to determine what was the common law of the State on that subject, because it construed Paragraph 1464 of the Civil Code as declaring peaceful picketing to be legal. In the case at bar, commenting on the earlier case, the court said: "The statute adopts the view of a number of courts which have held 'picketing,'

[44] See note 28, p. 364, *supra.*

[45] See note 25, p. 362, *supra,* 2nd paragraph; also *Lindsay & Co.* v. *Montana Federation of Labor,* 37 Mont. 264; *Parkinson Co.* v. *Building Trades Council,* 154 Cal. 581.

[46] See note 29, p. 365, *supra.*

if peaceably carried on for a lawful purpose, to be no violation of any legal right of the party whose place of business is 'picketed,' and whether as a fact the picketing is carried on by peaceful means, as against the other view, taken by the federal courts and many of the state courts, that picketing is *per se* unlawful." Shortly before that decision the Criminal Court of Appeals of Oklahoma had placed a similar construction upon a statute of that State, declaring that "the doctrine [that picketing is not *per se* unlawful] represents the trend of legal thought of modern times, and is specifically reflected in the statute above construed." *Ex parte Sweitzer*, 13 Okl. Cr. 154, 160. See *St. Louis* v. *Gloner*, 210 Mo. 502. A State, which despite the Fourteenth Amendment possesses the power to impose on employers without fault unlimited liability for injuries suffered by employees,[47] and to limit the freedom of contract of some employers and not of others,[48] surely does not lack the power to select for its citizens that one of conflicting views on boycott by peaceful picketing which its legislature and highest court consider will best meet its conditions and secure the public welfare.

The Supreme Court of Arizona, having held as a rule of substantive law that the boycott as here practiced was legal at common law; and that the picketing was peaceful and, hence, legal under the statute (whether or not it was legal at common law), necessarily denied the injunction, since, in its opinion, the defendants had committed no legal wrong and were threatening none. But even if this court should hold that an employer has a constitutional right to be free from interference by such a boycott or that the picketing practiced was not in fact peaceful, it does not follow that Arizona would lack the power to refuse to protect that right by injunction. For it is clear that the refusal of an equitable remedy for a tort is not

[47] *Arizona Employers' Liability Cases*, 250 U. S. 400.

[48] *Dominion Hotel* v. *Arizona*, 249 U. S. 265.

necessarily a denial of due process of law. And it seems to be equally clear that such refusal is not necessarily arbitrary and unreasonable when applied to incidents of the relation of employer and employee. The considerations which show that the refusal is not arbitrary or unreasonable show likewise that such refusal does not necessarily constitute a denial of equal protection of the laws merely because some, or even the same, property rights which are excluded by this statute from protection by injunction, receive such protection under other circumstances, or between persons standing in different relations. The acknowledged legislative discretion exerted in classification, so frequently applied in defining rights, extends equally to the grant of remedies.[49] It is for the legislature to say—within the broad limits of the discretion which it possesses—whether or not the remedy for a wrong shall be both criminal and civil and whether or not it shall be both at law and in equity.

A State is free since the adoption of the Fourteenth Amendment, as it was before, not only to determine what system of law shall prevail in it, but, also, by what processes legal rights may be asserted, and in what courts they may be enforced. *Missouri* v. *Lewis*, 101 U. S. 22, 31; *Iowa*

[49] In *Gooch* v. *Stephenson*, 1 Shepley (Me.) 371 (1836), the plaintiff attacked as unconstitutional a statute declaring that no action of trespass should be brought against an owner of cattle breaking through an insufficient fence. The court, *inter alia*, said:

"It has been insisted that justice and the security of rights is best promoted by maintaining the remedy as it before existed; but that is an argument which addresses itself to the legislative power, and not to the judicial. . . . It was for the legislature to determine what protection should be thrown around this species of property; . . . and where he [the owner] might invoke the aid of courts of justice. They have no power to take away vested rights; but they may regulate their enjoyment."

In this case the public importance of good fences was held to justify the denial of an existing remedy for injuries to property or a curtailment of the right.

Central Ry. Co. v. *Iowa*, 160 U. S. 389. As a State may adopt or reject trial by jury, *Walker* v. *Sauvinet*, 92 U. S. 90; or adopting it may retain or discard its customary incidents, *Hayes* v. *Missouri*, 120 U. S. 68; *Brown* v. *New Jersey*, 175 U. S. 172; *Maxwell* v. *Dow*, 176 U. S. 581; as a State may grant or withhold review of a decision by appeal, *Reetz* v. *Michigan*, 188 U. S. 505; so it may determine for itself, from time to time, whether the protection which it affords to property rights through its courts shall be given by means of the preventive remedy or exclusively by an action at law for compensation.

Nor is a State obliged to protect all property rights by injunction merely because it protects some, even if the attending circumstances are in some respects similar. The restraining power of equity might conceivably be applied to every intended violation of a legal right. On grounds of expediency its application is commonly denied in cases where there is a remedy at law which is deemed legally adequate. But an injunction has been denied on grounds of expediency in many cases where the remedy at law is confessedly not adequate. This occurs whenever a dominant public interest is deemed to require that the preventive remedy, otherwise available for the protection of private rights, be refused and the injured party left to such remedy as courts of law may afford. Thus, courts ordinarily refuse, perhaps in the interest of free speech, to restrain actionable libels. *Boston Diatite Co.* v. *Florence Manufacturing Co.*, 114 Mass. 69; *Prudential Assurance Co.* v. *Knott*, L. R. 10 Ch. App. 142. In the interest of personal liberty they ordinarily refuse to enforce specifically, by mandatory injunction or otherwise, obligations involving personal service. *Arthur* v. *Oakes*, 63 Fed. 310, 318; *Davis* v. *Foreman*, [1894] 3 Ch. 654, 657; *Gossard* v. *Crosby*, 132 Ia. 155, 163, 164. In the desire to preserve the separation of governmental powers they have declined to protect by injunction mere political rights, *Giles* v.

Harris, 189 U. S. 475; and have refused to interfere with the operations of the police department. *Davis* v. *American Society for the Prevention of Cruelty to Animals*, 75 N. Y. 362; *Delaney* v. *Flood*, 183 N. Y. 323; compare *Bisbee* v. *Arizona Insurance Agency*, 14 Ariz. 313. Instances are numerous where protection to property by way of injunction has been refused solely on the ground that serious public inconvenience would result from restraining the act complained of. Such, for example, was the case where a neighboring land owner sought to restrain a smelter from polluting the air, but that relief, if granted, would have necessitated shutting down the plant and this would have destroyed the business and impaired the means of livelihood of a large community.[50] There are also numerous instances where the circumstances would, according to general equity practice, have justified the issue of an injunction, but it was refused solely because the right sought to be enforced was created by statute, and the courts, applying a familiar rule, held that the remedy provided by the statute was exclusive.[51]

Such limitations upon the use of the injunction for the protection of private rights have ordinarily been imposed in the interest of the public by the court acting in the exercise of its broad discretion. But, in some instances, the

[50] See *McCarthy* v. *Bunker Hill & Sullivan Mining Co.*, 164 Fed. 927; *Bliss* v. *Anaconda Copper Mining Co.*, 167 Fed. 342; 186 Fed 789; *Cameron Furnace Co.* v. *Pennsylvania Canal Co.*, 2 Pearson (Pa.) 208; *Johnson* v. *United Railways Co.*, 227 Mo. 423, 450; *Conger* v. *New York, W. S. & B. R. R. Co.*, 120 N. Y. 29; *Wilkins* v. *Diven*, 106 Kan. 283; *Marconi Wireless Telegraph Co.* v. *Simon*, 227 Fed. 906; 231 Fed. 1021.

[51] *Dimmick* v. *Delaware, Lackawanna & Western R. R. Co.*, 180 Pa. St. 468; *Curran* v. *Delano*, 235 Pa. St. 478; *Janney* v. *Buell*, 55 Ala. 408; the mechanics' lien, for instance, is not protected by equitable remedies but only by statutory provisions, *Chandler* v. *Hanna*, 73 Ala. 390; *Walker* v. *Daimwood*, 80 Ala. 245; Phillips on Mechanics Liens, §§ 307, 308.

denial of the preventive remedy because of a public interest deemed paramount, has been expressly commanded by statute. Thus, the courts of the United States have been prohibited from staying proceedings in any court of a State, Judicial Code, § 265; and also from enjoining the illegal assessment and collection of taxes. Revised Statutes, § 3224; *Snyder* v. *Marks*, 109 U. S. 189; *Dodge* v. *Osborn*, 240 U. S. 118. What Congress can do in curtailing the equity power of the federal courts, state legislatures may do in curtailing equity powers of the state courts; unless prevented by the constitution of the State. In other words States are free since the adoption of the Fourteenth Amendment as they were before, either to expand or to contract their equity jurisdiction. The denial of the more adequate equitable remedy for private wrongs is in essence an exercise of the police power, by which, in the interest of the public and in order to preserve the liberty and the property of the great majority of the citizens of a State, rights of property and the liberty of the individual must be remoulded, from time to time, to meet the changing needs of society.

For these reasons, as well as for others stated by Mr. Justice Holmes and Mr. Justice Pitney, [*ante*, 342, 344,] in which I concur, the judgment of the Supreme Court of Arizona should, in my opinion, be affirmed:—first, because in permitting damage to be inflicted by means of boycott and peaceful picketing Arizona did not deprive the plaintiffs of property without due process of law or deny them equal protection of the laws; and secondly, because, if Arizona was constitutionally prohibited from adopting this rule of substantive law, it was still free to restrict the extraordinary remedies of equity where it considered their exercise to be detrimental to the public welfare, since such restriction was not a denial to the employer either of due process of law or of equal protection of the laws.